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Supreme Court of the United States

OCTOBER TERM, 1935

No. 573

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

STATE OF WASHINGTON, Appellee.

Appeal From the Supreme Court of the State of Washington

Brief of Appellant

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Supreme Court of the United States

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No. 573

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vs.

STATE OF WASHINGTON, Appellee.

Appeal From the Supreme Court of the State of Washington

Brief of Appellant

STATEMENT OF THE CASE

This is a companion case to Northern Pacific Railway Company v. State of Washington, also submitted at this term of court (No. 529). The Great Northern case was tried immediately following the Northern Pacific case. The two cases were argued at the same time before the Supreme Court of the State of Wash-

ington (Rec. 84). While the two cases involve a consideration of the same statute and raise the same questions of law, some difference in the facts requires a complete statement of the Great Northern case. Like the Northern Pacific case, this is an action by the State of Washington, appellee here, to recover from the Railway Company, appellant in this court, an occupation tax of 1½% of gross *intrastate* revenue accrued from August to December, 1933, inclusive, imposed by Chapter 191, Laws of 1933, for the privilege of engaging in the business of a steam railway in the State of Washington.

The trial court made findings of fact and concluded that the act, as applied to appellant, violates the Commerce Clause of Article I, Section 8, and the due process clause of the Fourteenth Amendment to the Constitution of the United States. (Rec. 76.)

Judgment of dismissal was entered. (Rec. 77.) On an appeal by the State, the Supreme Court of the State of Washington adopted the facts found by the trial court, but reversed on questions of law, holding that, on the facts found, Chapter 191 does not violate the Constitution of the United States. *State v. Great Northern*, 83 Washington Decisions 66, 48 Pac. (2) 938; *State v. Northern Pacific*, 83 Washington Decisions 52, 48 Pac. (2) 931. (Rec. 84.)

RELEVANT PARTS OF CHAPTER 191.

Section 2 (1) describes business subject to the tax, distributed into five principal classifications, namely, extractive function; manufacturing and producing function; wholesaling and jobbing; retail distribution; performing and rendering services.

Section 2 (2) provides that from the first day of August, 1933, and until the 31st day of July, 1935, "there is hereby levied an annual tax or excise for the privilege of engaging in business activities * * * measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be * * * "

Section 2 (2) (a) imposes a tax of varying percentages of gross income for the several kinds of business.

Section 2 (2) (e) is in part as follows:

"Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business as follows: * * *

III—Steam Railway Companies: 1½%."

Section 3 provides:

"If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly ob-

tained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

Section 5 provides in part:

"In computing the amount of any tax imposed under subdivisions * * * 2 (e) * * * of Section 2 of this act there shall be excepted from gross proceeds of sales or gross income, so much thereof as is derived * * * from business which the State of Washington is prohibited from taxing under the Constitution of the State, or the Constitution or laws of the United States. * * * "

Section 6 requires payment of the tax in monthly installments and reports upon forms prescribed by the Tax Commission.

Section 7 requires an annual return for the entire year, verified by oath, and accompanied by payment of the balance, if any, of the tax due for the year.

Section 9 provides that the taxpayers shall keep a record of gross income for five years. Section 10, that if the taxpayer fails to make return, the Commission shall make the assessment, adding a penalty of 10% and a further penalty of 1% per month. Section 15, that if any tax or penalty be not paid within fifteen days after it is due, the Commission shall issue a

warrant to the sheriff, commanding him to levy upon and sell real and personal property of the taxpayer sufficient to pay the amount, together with the penalty of 1% for each thirty days after the date of the warrant, and further provides for the filing of the warrant with the Clerk of the Superior Court, and that when said warrant is so filed it shall become a lien upon the real and personal property of the taxpayer against whom it is issued, in the same manner as a judgment in a civil action, and with like effect.

Section 16 provides that the tax and penalty shall be a debt due the State of Washington and may be collected by the State the same as other debts. Section 17 that any person may be enjoined "from engaging and/or continuing in any business for which a privilege tax is required * * * until such tax shall have been paid."

Section 23 provides that it shall be unlawful to fail or refuse to obtain the license, or fail or refuse to make a return, or to make any false return, etc. Any person violating any of the provisions of the section shall be guilty of a gross misdemeanor.

JUDGMENT BELOW

Appellant made no return, paid no tax and received no license. Thereupon the State brought this action to recover the tax due for the months of August to

December, 1933, inclusive. While the trial court found the act unenforceable, because contrary to the Constitution of the United States, it found that if a tax were due under the act for this period, it amounted to the sum of twelve thousand nine hundred eighty eight and 35/100 dollars ($12,988.35). (Rec. 59.) In reversing the trial court the State Supreme Court directed that judgment be entered in this amount together with costs taxed at $732.85. (Rec. 97.)

FACTS AS FOUND BY TRIAL COURT AND ADOPTED BY STATE SUPREME COURT

The facts as found by the trial court and accepted by the Supreme Court of the State of Washington, may be summarized as follows:

Appellant is a Minnesota corporation. Its line of railroad extends from St. Paul and Duluth in Minnesota, through the intervening states, to Seattle and Tacoma in Washington, Portland in Oregon, Bieber in California and Vancouver in the Province of British Columbia, Canada. Appellant's railroad was constructed more than 35 years ago, and in order to provide adequate facilities for the transportation of both *interstate* and *intrastate* commerce appellant has invested therein over one hundred million dollars. As a common carrier by railroad of both intrastate and interstate commerce, appellant is subject to state and national regulatory laws. (Finding II, Rec. 58.)

Appellant's railroad comprises 10541 miles of track, of which 1450 miles are in the State of Washington. Appellant's railroad is taxed in the State of Washington on its fair market value as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature. (Finding III, Rec. 59.)

Ad valorem taxes levied and paid in 1933 amounted to $1,250,860.49. The tax imposed by Chapter 191 is not a property tax, nor in lieu—either in whole or in part—of a property tax, nor is it a supervision tax, but it is an excise tax imposed on appellant solely for the privilege of doing a "steam railway business" in the State of Washington. (The Supreme Court of Washington had previously held this to be an excise tax. *State ex rel Stiner v. Yelle*, 174 Wash. 402, 25 Pac. (2) 91). (Finding III, Rec. 59.)

Computed at the rate named in the statute, the tax due from appellant to appellee, if the statute is valid, for the period from August to December, 1933, amounts to $12,988.35. (Finding IV, Rec. 59.)

Intrastate transportation in the State of Washington is much more expensive per unit of freight and in proportion to revenue than interstate, due, among others, to the following causes:

The much shorter average haul of the intrastate business, the lesser traffic density, especially on branch lines most largely used locally, much less tonnage per train, more frequent stops and double terminal expense due to the fact that intrastate freight is both originated and terminated in the state, whereas interstate freight incurs at most but one terminal handling in the state. (Finding V, Rec. 60.) (In this connection see *Rowland v. Boyle*, 244 U. S. 110; *Boyle v. St. L. & S. F. R. Co.*, 222 F. 539, 550.)

A special study was made by appellant to determine the financial result of operating its railway line in intrastate commerce in the State of Washington for the year 1933. No such original study was made by appellee. Based upon this study, the operating revenues, operating expenses, net railway operating deficit and other results of appellant's intrastate operations in the State of Washington for the year 1933, were as follows:

1. Gross Operating Revenues	$ 2,179,760
2. Operating Expenses	1,730,361
3. Net Revenue from Railway Operations	449,399
4. Railway Tax Accruals	335,247
5. Railway Operating Income	114,152
6. Equipment Rents—Net Debit	19,966
7. Joint Facility Rent—Net Debit	193,455
8. Total Rentals—Net Debit	213,421
9. Net Railway Operating Deficit	99,269
10. Cost of Reproduction New, Less Depreciation, as of I. C. C. Valuation Date (June 30, 1915) plus	

Additions and Betterments to December 31, 1933, of Railway Property and Equipment in Washington—Intrastate Proportion	$29,733,312
11. Annual Rate of Return Earned on Above Reproduction Cost	Deficit
12. Interest on above Reproduction Cost at 5.75% per Annum	1,709,665
13. Amount Short of Earning a Return of 5.75% per Annum	1,808,984

(Finding VI, Rec. 60, 61.)

The formula used in making the cost study is explained in detail in findings which will be found in the appendix. (See Finding VII, Rec. 62.)

Appellant's *intrastate* and *interstate* business are inseparably commingled and mutually dependent. For one of the test periods used in the cost study—the seven days ending November 21, 1933—intrastate revenue net ton miles were 4,155,692, or 32.35%, and interstate revenue net ton miles were 8,691,505, or 67.65%. For the month of November, 1933, intrastate revenue net ton miles were 14,547,465, or 24.80%, and interstate revenue net ton miles were 44,121,835, or 75.20%. For the entire year 1933 intrastate revenue net ton miles were 138,265,617 or 23.10% and interstate revenue net ton miles were 460,335,442, or 76.90%. Both interstate and intrastate business, eastbound and westbound respectively, were largely transported by appellant over the same lines of railroad, in the same trains, by means of the

same employees, and with the same facilities. It is not possible, practically and economically, or at all, to carry intrastate freight separately from interstate freight by different lines of railroad, in different trains, or by means of different facilities and employees. Similar facts were found as to passenger traffic. (Finding XI, Rec. 72.)

If appellant could and should abandon its intrastate freight business, and continue to do interstate freight business, it could and would somewhat reduce its train service and its car mileage and save some direct expense applicable to its freight business in the State of Washington, but it would thereby lose its entire gross revenue from intrastate freight business of $1,622,644. Also some reduction in passenger train service could be effected if intrastate passenger business were to be discontinued, which would result in a further saving in direct expense, but the result would be the loss by appellant of its entire gross revenue from intrastate passenger business, which for the year 1933 amounted to $557,116. The net result of abandonment by appellant of its intrastate passenger and freight business, in order to escape the tax imposed by Chapter 191, Laws 1933, would be the loss of $2,179,760, and the saving of not more than 14% of that amount. (Finding XII, Rec. 72.)

Appellant's local or intrastate business in the State of Washington is conducted at a loss, and was conducted at a loss during the entire year 1933, and the tax imposed by Chapter 191, Laws of 1933, if paid, will have to be paid out of appellant's earnings from interstate and foreign commerce and from the income of its property located outside the State of Washington. (Finding VIII, Rec. 69.) If appellant could and should abandon its intrastate freight and passenger business, the entire burden of maintaining and operating its interstate system of railroad in Washington, constructed and equipped to handle both interstate and local commerce, would fall entirely on interstate commerce and would necessitate an increase of rates and fares greater than the same could bear, as a practical matter or at all, and would result in the destruction of an essential instrument of interstate commerce, and of the value of appellant's property in the State of Washington to the amount of more than one hundred million dollars. (Finding XII, Rec. 72.)

Appellant's railroad is well located and economically managed, and serves the principal cities and towns of the State of Washington. Its continued operation in intrastate business is essential to the people of the state and of the United States. Most of appellant's local rates cannot be raised because of compe-

tition from other kinds of transportation. Under the state law, such rates cannot be raised without the consent of the Department of Public Works. Appellant has heretofore applied for an increase of local rates, but the application was denied by the Department by the order attached to appellant's supplemental answer as Exhibit "A" and made a part of the findings. The court found that the appellant, as a practical matter, has been unable to increase its revenues from local business, and that whether it can do so in the future is a matter attended with great uncertainty. Any increase could be accomplished only after long and expensive litigation, and, if obtained, would have no bearing upon appellant's income in the year 1933, or for many years subsequent thereto. The court found that appellant "has done all it can do to increase its revenue, but is unable to do so." Exhibit "A" is an order made by the Department in the matter of application for an extension of the increase in freight rates in connection with the order of the Interstate Commerce Commission extending increases allowed in Ex Parte 103. The Department denied the increase, upon findings in substance that to do so would result in discrimination in violation of state law, and because "it is a matter of common knowledge that the present level of rail rates is too high to permit freedom of movement by rail."

To extend the increase, said the Department, would be of no benefit from the standpoint of revenue, because it would drive traffic to motor vehicles and other competing agencies, thus resulting in greater loss than gain. (Finding XIII, Rec. 73, Exhibit "A", Rec. 21, 23.)

CONCLUSIONS OF LAW OF TRIAL COURT

The trial court concluded that appellant, a common carrier by railroad subject to the provisions of the state Public Service Commission Law, Chapter 117 of the Washington Session Laws of 1911, Remington's Revised Statutes, Chapter 1, Title 72, and to the acts of Congress regulating interstate commerce, could not, as a matter of law, retire from local or intrastate business while continuing to transact interstate business, stating that although the measure of the tax is the gross income received from intrastate steam railway business, "the privilege or occupation upon which the tax is laid is that of engaging in railroad business, which includes the transaction of both intrastate and interstate business. The penalty for failure to pay is liability to injunction proceedings and seizure and sale of the physical property of the railway, which would make it impossible to engage in either intrastate or interstate commerce * * * . A state may require payment of an

occupation tax from one engaged in both intrastate and interstate commerce, but a state cannot tax interstate commerce, or the privilege of engaging in it. Where conditions are prescribed, a license required and a tax is imposed on one engaged in both interstate and intrastate commerce, certain conditions must be met. One is that the party taxed must be free in law and in fact to withdraw from its intrastate business, while continuing to transact its interstate business free of the tax. Chapter 191, Laws of 1933, does not meet this condition." (Conclusions I and II, Rec. 74.)

The trial court concluded that appellant "was not and is not free, under the constitution and laws of the state, to withdraw from its intrastate business, while continuing to transact its interstate and foreign business. It performs an indispensable service for the people of the State of Washington, from which it cannot withdraw. Its continued performance of this service is compellable at the suit of the state and of the citizens of the state having an interest in such performance. * * *" The court further concluded that appellant cannot "as a matter of fact, or as a practical matter, withdraw from its intrastate business while continuing to transact its interstate and foreign business." (Conclusions III and V, Rec. 75, 76.)

That appellant's railroad "was constructed to handle both classes of business, and to abandon its intrastate business would throw the entire burden of maintaining and operating the interstate system on interstate commerce, and would create operating losses greater than such commerce could bear." That appellant's interstate business "would necessarily be destroyed and its property would be confiscated." (Conclusion V, Rec. 76.)

The court then concluded that the tax imposed by Chapter 191, Laws of 1933, on the pretext of being a tax or fee for the doing of local business in the State of Washington, is, in reality, a tax and burden upon interstate commerce and upon the gross revenues received by appellant therefrom, in that said tax, if paid, would have to be paid out of the earnings of appellant from its interstate business, and is a tax upon its business done and income earned in other states, and upon property of the appellant located outside the State of Washington, which tax it cannot avoid by withdrawing its property from use in local commerce within the State of Washington, and that said tax is in violation of the constitution of the United States for the reason, among others, that it imposes a burden upon interstate commerce in violation of Article I, Section 8 and the due process clause of the Fourteenth Amendment to the constitution of the United States. (Conclusion of Law VII, Rec. 76.)

FINDINGS AND JUDGMENT OF STATE SUPREME COURT

The Supreme Court of the State of Washington, in its opinion, 83 Washington Decisions 66, 48 Pac. (2) 938; 83 Washington Decisions 52, 48 Pac. (2) 931, (Rec. 84) holds that the tax applies only to income from intrastate business. Adopting the findings below, it states: "The interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and it is necessary to make up this loss from the income from interstate commerce." It states the question for decision as follows:

> "The next, and as we view it, the important and difficult question is, whether the tax may be collected even though the railway company * * * may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent (appellant here) cannot, as a matter of law, retire from its intrastate business; (b) that it is impracticable, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss, which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss."

The opinion concedes that a tax imposed as a license to do *both* kinds of business, or a tax levied *directly*

upon an instrumentality used in both kinds of business would be void. But it distinguishes the case at bar on the ground that the tax is measured by *gross income* and "the income from the interstate business may be segregated from the gross income from the intrastate business and (the tax) be held valid." It denies the objection based on unprofitableness of the intrastate business, on the ground that appellant has "a remedy by application to the Department of Public Works (for an increase of rates), with the right of review by the Superior Court and an appeal to this court." And while, says the court, it appears that such an application has been made and denied, "it does not appear that respondent (appellant here) has exhausted the relief granted by the statute, and, until it does so, it cannot be said that even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional." Presumably the Supreme Court relies solely on the fact that appellant did not take a writ of review to the Superior Court to reverse the Department's order, Exhibit "A", supra, denying increase in intrastate rates, because the appellate court does not disagree with the finding of the trial court that "most all defendant's (appellant here) local rates cannot be raised because of competition from other kinds of transportation

* * * that defendant, as a practical matter, has been unable to increase its revenues from local business, and * * * that whether it can do so in the future is a matter attended with great uncertainty, and could be accomplished only after long and expensive litigation, and such increases, if obtained, would have no bearing upon its income in the year 1933, or for many years subsequent thereto * * * that defendant has done all it can do to increase its revenue, but is unable to do so." (Rec. 73, 74, 84.)

On the 13th of September, 1935, the Supreme Court of Washington directed the entry of judgment in favor of the appellee and against the appellant in the sum of $12,988.35, with costs of the action taxed at $732.85. (Rec. 97.) This appeal was then taken.

SPECIFICATION OF ERRORS RELIED UPON

(1) The Supreme Court of Washington, having found that appellant is engaged in both intrastate and interstate commerce, and having held that as a matter of *law* it cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8, of the Constitution of the United States.

(2) The Supreme Court of Washington, having found that appellant's interstate and intrastate busi-

ness in Washington are inextricably commingled, and that as a matter of *fact*, and as a practical matter, appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that chapter 191, Laws of 1933, does not violate Article I, Section 8, of the Constitution of the United States.

(3) The Supreme Court of Washington, having found that appellant's intrastate business is conducted at a loss, which must be borne out of the income from its interstate business, erred in deciding that the tax imposed by Chapter 191, Laws of 1933, does not violate Article I, Section 8, of the Constitution of the United States.

(4) The Supreme Court of Washington, having found that appellant's intrastate business is conducted at a loss, which must be borne out of income from its interstate business, or out of income derived from property located outside the State of Washington, erred in refusing to hold that Chapter 191, Laws of 1933, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(5) The Supreme Court of Washington, having found that appellant's intrastate business is conducted at a loss, which must be borne out of income from its interstate business, erred in holding that Chapter

191, Laws of 1933, and the tax imposed thereby, does not violate Article I, Section 8, of the Constitution of the United States, for the stated reason that appellant has not exhausted its remedy (by writ of review) to obtain intrastate rate increases, and because that circumstance is immaterial, not supported by, and is contrary to, the facts found by the trial court in Finding of Fact XIII.

(6) The Supreme Court of Washington, for each and all of the reasons contained in the preceding assignments, erred in reversing the judgment of the Superior Court of Thurston County and in rendering judgment in favor of the State of Washington and against appellant for the tax imposed by Chapter 191, Laws of 1933, in the sum of $12,988.35, together with costs taxed at $732.85.

SUMMARY OF ARGUMENT

I.

This court will not review facts found by two lower courts.

II.

This court will determine questions raised under the Constitution of the United States upon its own judgment of the actual operation and effect of the tax imposed by Chapter 191, Laws of 1933, irrespective of the form it bears or how it is characterized by the

state legislature and state court. Chapter 191 violates Article I, Section 8, of the Federal Constitution, because its actual operation and effect is to impose a tax for the privilege of engaging in railway business in the State of Washington. Since appellant cannot abandon its intrastate and continue its interstate business, the tax, while measured by the gross income from, and ostensibly for the privilege of doing, intrastate business only, is in practical operation and effect a tax for the privilege of doing both intrastate and interstate business.

III.

Chapter 191, Laws 1933, as applied to appellant, violates Article I, Section 8, and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, because appellant's intrastate business, from which it cannot withdraw while continuing to do interstate business, is done at a loss, and the tax imposed by Chapter 191, if paid, must be paid out of income derived from appellant's interstate business, and from property located outside the State of Washington.

IV.

The tax imposed by Chapter 191, Laws of 1933, is not rendered constitutional by the fact the appellant did not obtain permission, either by writ of review

from the order of the Department of Public Works of the State of Washington, or otherwise, to raise rates which the state court has found, as a practical matter, cannot be raised.

V.

Chapter 191, Laws of 1933, violates the Due Process Clause of 14th Amendment to Constitution of United States.

VI.

The occupation tax imposed by Chapter 191, Laws of 1933, is not rendered constitutional by a general reduction of ad valorem taxes.

ARGUMENT

This Court Will Not Review Facts Found by Two Lower Courts

Appellant has not brought the evidence to this court because it has assigned no error to the findings of fact, and this court does not review findings approved by two lower courts except where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts,—circumstances not here present. *Page v. Arkansas Natural Gas Corp.*, 286 U. S. 269;

Fiske v. Kansas, 274 U. S. 380; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389.

The appellee has, however, incorporated the evidence in the record and directed that it be printed. The Clerk's bill for this unnecessary printing has been paid by the appellant. Regardless of the outcome of this appeal appellant requests an order under Rule 13, paragraph 9, requiring the appellee to bear the expense of this unnecessary printing.

This court will determine questions raised under the Constitution of the United States upon its own judgment of the actual operation and effect of the tax imposed by Chapter 191, Laws of 1933, irrespective of the form it bears or how it is characterized by the state legislature and state court.

The State Court holds that the tax imposed by Chapter 191 is a tax upon gross intrastate revenues. Although not directly stated, it implies that the tax is imposed for the privilege of doing intrastate business in Washington. It further holds that the tax is valid, although appellant cannot, either as a matter of law or as a practical matter, withdraw from intrastate business and continue to carry on its interstate business, and although its intrastate business is conducted at a loss, so that the tax, if paid, must be met out of income from its interstate business, or from property located outside the State of Washington. *State v. Northern Pacific Railway Co.*, 83 Washing-

ton Decisions, 52; 48 Pac. (2d) 931; *State v. Great Northern Railway Co.*, 83 Washington Decisions, 66; 48 Pac. (2d) 938 (Rec. 84).

This court is not bound by the decision of the Washington court that the tax imposed by the statute in question is for the privilege of engaging in local business, and not a burden upon interstate commerce, if, as a matter of practical application, it is a tax for the privilege of engaging in both intrastate and interstate business, since one cannot be abandoned without the other, either as a matter of law, or as a matter of practical railroad management. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *St. L. S. W. R. Co. v. Arkansas*, 235 U. S. 350; *Kansas City Railroad v. Botkin*, 240 U. S. 227; *Crew-Levick v. Pennsylvania*, 245 U. S. 292; *Standard Oil Co. v. Graves*, 249 U. S. 389; *LaCoste v. Department of Conservation*, 263 U. S. 545; *Macallen Co. v. Massachusetts*, 279 U. S. 620; *Educational Films Corporation v. Ward*, 282 U. S. 379; *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265; *Fox Film v. Doyal*, 286 U. S. 123.

While we recognize the rule that this court accepts a state court's interpretation of a state statute, consideration will be given to the provisions of the statute in determining the question whether "the tax is

what, in form and by decision of the state court, it is declared to be."

The provisions of Chapter 191 (the material portions of which will be found under the heading "Statement of the Case") determine the operation and effect of the tax. The statute imposes a tax for the privilege of engaging in railroad business, which necessarily includes the transaction of both intrastate and interstate business. The measure of the tax is the intrastate earnings. The word "business" is defined as including "steam railroads" and "all activities engaged in with the object of gain, benefit or advantage", and the tax is for the privilege of engaging in such business. Interstate commerce comes within the terms of these provisions.

The penalty for failure to pay is liability to injunction proceedings, and sheriff's sale of the physical property of the railroad, which would make it impossible to engage in either intrastate or interstate commerce.

That portion of the statute which excludes interstate earnings from the computation of the tax merely provides that in computing the amount of the tax, revenues that cannot be taxed under the Constitution of the United States shall not be included (Section 5). It does not provide that the business for which

the tax is imposed shall exclude the transportation of interstate commerce, or that if the tax on intrastate earnings is not paid the physical property of the railroad shall not be sold or disturbed, and it may, nevertheless, continue to engage in interstate commerce. On the contrary, the statute specifically provides that the privilege of engaging in business for which the tax is imposed, includes all activities engaged in by the taxpayer with the object of gain, benefit or advantage.

Since interstate commerce comes within this classification and appellant cannot discontinue its intrastate and continue its interstate business, the appellant is required to pay a tax upon its local revenues for the privilege of engaging in both kinds of business. A tax for the privilege of engaging in interstate commerce, even though it is not paid out of earnings from such commerce, amounts to a regulation thereof, in violation of the Federal Constitution. *A. T. & S. F. Ry. v. O'Connor*, 223 U. S. 280; *Meyer v. Wells Fargo & Co.*, 223 U. S. 298; *Williams v. Talladega*, 226 U. S. 404; *Leloup v. Port of Mobile*, 127 U. S. 640; *Minnesota v. Blasius*, 290 U. S. 1. This court said in the latter case that "a state cannot tax interstate commerce either by laying a tax upon the business which constitutes such commerce, or the priv-

ilege of engaging in it, or upon the receipts as such, derived from it."

The State Court says in its opinion:

"The State has the authority to tax property which is used in interstate commerce and which is regularly and permanently located within its limits, where the ascertainment of the amount assessed is dependent upon the value of the property within the state as the property of other citizens is taxed."

Citing *Leloup v. Port of Mobile*, *supra*, and *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1. The reason for that rule is that interstate commerce is only indirectly affected by a tax on property.

But Chapter 191 imposes the tax on gross income. In *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, this court held such a tax a direct burden upon the business affected, saying:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected, and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably, it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce."

The State Court has held the tax imposed by Chapter 191 does not burden interstate commerce, and in effect that it is imposed upon intrastate income for the privilege of engaging in intrastate business. Nevertheless, the appellant cannot escape the tax by discontinuing its intrastate, unless it also discontinues its interstate, business. Its intrastate business is conducted at a loss, and therefore it must pay the tax out of its income from interstate business. If it does not pay the tax its physical property may be sold at sheriff's sale, the State thus effectively discontinuing appellant's interstate as well as its intrastate business.

Under these circumstances, can it be said that the tax imposed by Chapter 191 is not a direct burden upon, and a regulation of, interstate commerce? The purpose for which the statute was enacted is wholly immaterial if "either directly or by its necessary operation" it burdens interstate commerce. *International Paper Co. v. Massachusetts*, 246 U. S. 135. "If it depends upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." *Galveston, Houston & San Antonio Ry. v. State of Texas*, 210 U. S. 217.

"When the question is whether a tax imposed by a state deprives a party of rights secured by the Fed-

eral Constitution," this court has said: "the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the character of that scheme as adopted by the State Court." The regard is to "the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state." *St. L. S. W. R. Co. v. Arkansas, supra.*

In *Macallen Co. v. Massachusetts, supra,* this court said:

"The words of the act and the opinion of the state court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. * * * This court must determine for itself, by independent inquiry, whether the tax here is what, in form and by the decision of the state court, it is declared to be, namely, an excise tax on the privilege of doing business, or, under the guise of that designation, is in substance and reality a tax on the income derived from tax exempt securities. If, by varying the form, that is to say, if, by using one name for a tax instead of another, or imposing a tax in terms upon one subject when another is in reality aimed at,—the substance and effect of the imposition may be changed, constitutional limitations upon powers of taxation would come to naught: The rule is otherwise."

Standard Oil Co. v. Graves, supra, is a case which also went up from the Supreme Court of the State of Washington, in which the court had sustained a state statute imposing inspection fees on oil intended for sale in the state, including oil brought into the State

of Washington from the State of California. The Oil Company contended that the statute was unconstitutional, in that it directly burdened interstate commerce by imposing inspection fees far in excess of the cost of inspection. The State Court held that it was not a property tax or a regulatory tax, but sustained it as an excise or occupation tax imposed for the privilege of selling oil within the state. Reversing the State Court and holding the statute invalid, this court said with respect to the effect of the state court decision:

"While this court follows the decisions of the highest court of a state as to the meaning of statutes in cases of this character, the name given to the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the constitution of the United States, the law must be declared void."

In *Western Union Telegraph Co. v. Kansas, supra,* this court said:

"The disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

Since the appellant cannot withdraw from intrastate commerce and continue its interstate business, and the tax imposed by Chapter 191, if paid, must be paid from income from interstate commerce, because intrastate business is done at a loss, it follows that if the tax is valid then a tax of 10% or even 50% may be imposed by Washington and other states; because, as said by this court in *State of Minnesota v. Barber*, 136 U. S. 313, quoting from *Welton v. Missouri*, 91 U. S. 275: "The power of the state could not be controlled, however unreasonable and oppressive its action". And, as said in *Fox v. Standard Oil Co.*, 79 U. S. Supreme Court Advance Opinions, 1934-1935, page 339, even if such "a tax should destroy a business, it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk."

The state court is on untenable ground in sustaining Chapter 191 for the reason that it is measured by a percentage of gross intrastate revenue. The tax is no less a burden on interstate commerce and a condition of appellant's right to engage therein because it is measured by a percentage of revenue than if measured by the number of cars, number of miles of track, or number of farm crossings. The states, realizing that a tax of a percentage of both intrastate and interstate revenue for the privilege of doing intra-

state business is invalid, resort to the device of measuring the tax by a percentage of revenue from intrastate business only. This measure does not reduce the tax, since the rate per cent is correspondingly increased. The exaction is called an occupation tax for the privilege of doing local business, though it is known to all, and judicially noticed, that railroads have no option. *W. U. T. Co. v. Kansas,* 216 U. S. 1. They cannot retire, as a practical matter, without ruin. In the State of Washington they cannot do so even as a matter of law. The state thus burdens interstate commerce and taxes property beyond its limits by the simple device of calling the exaction an occupation tax for the privilege of doing intrastate business. But this court has said that a tax will be judged by its practical operation and effect, rather than by its name or form. *Western Union Telegraph Co. v. Kansas, supra; St. L. S. W. R. Co. v. Arkansas, supra; Standard Oil Co. v. Graves, supra; Macallen v. Massachusetts, supra; Dawson v. Kentucky D. & W. Co.,* 255 U. S. 288; *G. H. & S. A. R. Co. v. Texas,* 210 U. S. 217; *W. U. T. Co. v. Kansas,* 216 U. S. 1; *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203; *Shaffer v. Carter,* 252 U. S. 37.

In the instant case the *reality* is that if appellant withdraw from its intrastate business its interstate business will be destroyed, its property confiscated,

and it will be made insolvent. (Conclusion of Law V, Rec. 76.) The alternative is to pay a tax for the privilege of rendering service which, as found below, is essential to the people of this state while being given at a loss. Under the facts found, the real nature of the exaction cannot be concealed by calling it a tax for the privilege of doing intrastate business. Compare *A. T. & S. F. Ry. v. O'Connor, supra; Meyer v. Wells Fargo Co., supra; Williams v. Talledega, supra; Leloup v. Port of Mobile, supra; Minnesota v. Blasius, supra; Baldwin v. Seelig*, 79 L. Ed. 525.

Appellant cannot withdraw from its intrastate business in Washington and at the same time continue its interstate business, either as a matter of law, or as a matter of fact, or as a practical matter. Therefore, under the decisions of this court the tax imposed by Chapter 191, Laws of 1933, is a burden upon, and a regulation of, interstate commerce, in violation of Article I, Section 8 of the Constitution of the United States.

In deciding the case at bar the Supreme Court of the State of Washington assumed that appellant cannot, under the laws of the State of Washington, abandon its local business while continuing its interstate business. (Finding of Fact IX, Conclusion of Law III, Rec. 70, 75; Opinion of Supreme Court, Rec. 84; 83 Washington Decisions 52, 66, 48 Pac. (2d) 931, 938.) This has been the rule in the State of Washington, at least since March 22, 1915, at which

time it was established in the case of *Northern Pacific Railroad v. State*, 84 Wash. 510, 523, 525; 147 Pac. 45. The rule was again approved on May 1, 1928 in *Great Northern v. State*, 147 Wash. 630; 267 Pac. 506.

While a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce the exaction, in order to be valid under the commerce clause, must be solely on account of the intrastate business done and the party taxed must be free, in *law* and *fact*, to withdraw from the intrastate business without withdrawing also from the interstate.

In *Pullman Co. v. Adams*, 189 U. S. 420, a Mississippi statute imposed "on each sleeping and palace car company carrying passengers from one point to another within the state a tax of $100, and 25c per mile for each mile of railroad track over which the company runs its cars * * * in this state."

Evidence offered to prove that intrastate business was done at a loss while the corporation was obliged to engage in such business by the state constitution was rejected. This court said:

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true

that the state constitution and the statute combined would impose a burden on commerce beween the states analogous to that which was held bad in Crutcher v. Kentucky, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by Osborne v. Florida, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."

The act held bad in *Crutcher v. Kentucky*, 141 U. S. 47, required the agent of every express company to pay a small fee and obtain a license to transact *any* business for the company, and file a statement showing that the company had capital of a prescribed amount. The statute, as construed, applied to both interstate and intrastate business. The court said:

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

Nor, said the court, is the difficulty at all obviated because the express company,

"as incidental to its main business, (which is to carry goods between different states) does also some local business by carrying goods from one point to another within the state of Kentucky. This is probably quite as much for the accommodation of the people of that State as for the advantage of the company."

Certainly, no one will say that Chapter 191 would be valid if, in terms, it prescribed conditions for the privilege of doing *both* intrastate and interstate business, as in *Crutcher v. Kentucky*. Compare *Cooney v. Mountain States T. Co.*, 294 U. S. 384, 79 L. Ed. 498. (In the *Crutcher* case there was no claim that intrastate business was done at a loss.)

The Supreme Court of Washington, in the instant case, departed from this well established rule which it had previously followed and from which it may not recede, since it is a question of federal law. In *State v. Northern Express Co.*, 76 Wash. 636, 136 Pac. 1160, it had previously held that an occupation tax of a percentage of gross revenue from intrastate business for the privilege of doing that business, violates the commerce clause, because of the condition that the express company is not free, under state law, to withdraw from the intrastate business while continuing the interstate. Though the case was reversed on rehearing, 80 Wash. 308, 141 Pac. 757, that decision is based upon the point that the express company *is* free to withdraw from its intrastate business, following *Pullman Co. v. Adams*, *supra*, and like cases. Again, in *Great Northern v. State*, 147 Wash. 630, 267 Pac. 506, a license fee or tax measured by a percentage of authorized capital stock, imposed for the privilege of doing intrastate business,

was declared void on the ground that the railway company, a common carrier under the laws of the state, could not renounce its intrastate business while continuing to transact its interstate, distinguishing the second decision in the Express case, and following the rule of the *Crutcher* and *Pullman* cases. The decision in the case at bar is contrary to the decisions of this court and the three prior decisions of the state court, in that it is now held that such a tax does not burden interstate commerce even though the party taxed cannot withdraw from its intrastate business without also withdrawing from its interstate business.

Allen v. Pullman, 191 U. S. 171, considers two acts, one imposing a tax of $500 per car on sleeping car companies doing business in the state, making no distinction between cars used in intrastate commerce and interstate commerce, and the other imposing a flat tax of $3000 on sleeping car companies which carry one or more local passengers in the state. Following *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, the first statute was held invalid because it applied to the privilege of operating the cars in both intrastate and interstate commerce. It was argued by the Pullman Company that the tax of $3000 per annum imposed for carrying one or more local passengers was assessed upon such a small proportion of

the entire business within the state as to be but a thinly disguised attempt to tax the privilege of engaging in interstate commerce. The court said:

"If the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from Pullman Co. v. Adams, 189 U. S. 420, decided at the last term, wherein it was held that the privilege tax imposed by the state of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged, that under the Constitution of Mississippi, the Pullman Company was a common carrier, required to carry passengers, and therefore could not be taxed for the privilege of doing that which it was compelled to do; but in view of the decision of the Supreme Court of Mississippi, sustaining the tax, it was assumed that no such objection existed under the state constitution."

Other decisions of this court consider inability to withdraw from intrastate business as a practical matter. Thus, in *Western Union v. Kansas*, 216 U. S. 1, where a tax of a percentage of the entire capital stock of the Telegraph Company for the privilege of doing intrastate business was held invalid under both the commerce and due process clauses, it was contended

that, as the Telegraph Company might withdraw from its local business, it could not complain of the tax. The court observed that the Telegraph Company lawfully entered Kansas long before and was legally there when the act was passed. The state conceded its right to remain if it would pay the tax; and only because of its refusal sought the aid of the court to oust the company from its local business.

"The State," said this court, "knows that the telegraph company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet it seeks to enforce a regulation requiring the company by paying the 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public —a right lawfully acquired from the United States when Kansas was a territory, and exercised consistently with the statutes of the state for many years after Kansas was admitted as a state of the Union. * * "

"The telegraph company has expended in the state large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired; that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in

the state. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place."

Findings XI, XII and XIII and Conclusion of Law V disclose facts to which the language quoted applies with full force. (Rec. 72, 73, 74.)

Barrett v. New York, 232 U. S. 14, holds invalid an ordinance requiring an express company to pay a license fee and give bond for each vehicle, conditioned for safe delivery of packages, on the ground that intrastate packages are handled by the same vehicles and employees that handle interstate packages.

Bowman v. Continental Oil Co., 256 U. S. 642, was a suit by the Oil Company to restrain enforcement of a New Mexico statute imposing a gallonage tax upon sale of gasoline in the state, and a tax of $50 for each station or place of business at which gasoline was handled and sold in both intrastate and interstate commerce. The gallonage tax was upheld, but the license fee of $50 was held invalid. The court said:

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition

of carrying on interstate or foreign commerce * * * But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all."

So here, appellant necessarily transports both kinds of business by means of the same instrumentalities and employes, and cannot do otherwise. Therefore, a tax of a percentage of income from intrastate business, or a tax, however measured, for the privilege of doing intrastate business is, in reality, a tax for and condition of the right to do *both* kinds of business. Compare *Ludwig v. W. U. T. Co.*, 216 U. S. 146.

Interstate Buses v. Holyoke, 273 U. S. 45, was much relied on below, but not noticed by the State Supreme Court. It was a suit by a Bus Company to restrain a Street Railway Company and various public officials from enforcing a state statute forbidding the transportation of passengers within cities and towns of the State of Massachusetts without first obtaining a license and a certificate of public convenience and necessity. The lower court held that the statute was not shown to be a burden upon interstate

commerce because it was not shown that "the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's (Bus Company's) interstate passengers may not be carried efficiently and economically in buses used exclusively for that purpose, or that appellant's intrastate business is dependent in any degree upon the local business in question." The street railway had caused repeated arrests of the Bus Company's employes for failure to comply with the state law and obtain the certificate required for doing local business. The buses carried both local and interstate passengers. The State Supreme Court sustained the statute and its judgment was affirmed by this court. Upon the point here presented, the court used the following language:

"The burden is upon appellant to show that enforcement of the act operates to prejudice the interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no information as to the number of persons, if any, traveling in interstate commerce on appellant's buses over the part of the route competing with the street railway. It is not shown that the two classes of business

are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried *efficiently* and *economically* in buses used exclusively for that purpose, or that appellant's interstate business is *dependent* in any degree upon the local business in question. Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employes."

The case is in point, even though the statute was upheld, because the decision rests upon failure to prove the invalidating facts here found by both courts below. Findings XI, XII and XIII and Conclusion of Law V (Rec. 72, 73, 76). If we are correct in saying that the decision in the *Holyoke* case would have been against the statute had the invalidating facts been proved, it is controlling here.

Inseparability and mutual dependence of the two kinds of business, as conducted by rail carriers, are matters of common and judicial knowledge. In *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, the court said:

"Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and 50 per cent of the passenger receipts. * * * If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. * * *

"Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them." * * *

Again, in *Colorado v. United States*, 271 U. S. 153, the court said:

"This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."

Obviously, the courts below, could not have found the facts otherwise than as they did. Appellant's railroad was constructed in the State of Washington at a cost of over $100,000,000, to handle both kinds of business. Income from intrastate business is essential to its existence as a carrier of interstate commerce. Abandonment of appellant's intrastate business would have resulted in a loss in the year 1933 of $2,179,760 and a saving of not more than 14% of that amount. This is due to the fact that even though local service were discontinued it would be impossible to make much reduction in train service. In order to continue interstate service appellant would have to make a greater increase in its rates and fares than interstate commerce could bear. (Findings II, XI, XII, XIII, Rec. 58, 72, 73.)

Therefore, to require making of reports, taking out a license, and payment of a tax, for the privilege of doing intrastate business, is, in effect, to burden and regulate interstate commerce and to impose conditions upon the right to engage in it. As the amount of the tax, if valid, is a matter of state discretion, an essential instrumentality of interstate commerce may be destroyed by the state. This is made more apparent when we consider that, if the State of Washington can impose such a tax, all of the states through which appellant's line of railroad is constructed may do likewise. Compare *State of Minnesota v. Barber*, 136 U. S. 313; *Fox v. Standard Oil Co.*, 79 U. S. Supreme Court Advance Opinions, 1934-1935, page 339. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1. Quoting from the opinion of the court in the last case:

"It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its local expenses not only by exactions that directly burdened interstate commerce, but by taxation upon property situated beyond its limits."

Sprout v. South Bend, 277 U. S. 163, invalidates an ordinance prohibiting operation on the city streets of a motor bus unless it be licensed and payment made of a graduated fee based upon seating capacity. Sprout

operated between South Bend, Indiana, and Niles, Michigan. He was prosecuted and convicted for violation of the ordinance. Considering whether the ordinance could be sustained as imposing an occupation tax, the court said:

"A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce * * *. But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.*" Citing Barrett v. New York, supra; Bowman v. Continental Oil Co., supra, and other cases.

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, sustains an Ohio statute imposing an occupation tax of a percentage of gross intrastate revenue for the privilege of doing intrastate business. The court quotes the language quoted above from *Sprout v. South Bend.* The opinion of the Supreme Court of Washington in the instant case says of the Ohio case that this court did not invalidate the tax, although

"the facts * * * make it plain that, if the Gas Company had withdrawn from its intrastate business, it would have completely destroyed its interstate business. And so that case sustains the holding in the case at bar that a tax upon gross income from intrastate business is valid, even though the Railway Com-

pany could not withdraw therefrom without also withdrawing from its interstate business."

The Company brought gas into the state in pipe lines where it was received at pressure reducing stations, thence passed into local distributing systems for delivery to consumers. This court held that interstate transportation ended at the local distributing system. Thereafter the Gas Company did only intrastate business for which the occupation tax was imposed. The interstate and intrastate business were done *consecutively* with *different* facilities; not, as here, *simultaneously* with the *same* facilities. The inseparability of the two kinds of business and dependency of the interstate upon the intrastate was not established in the Ohio case, as here. . Nor was there an obligation by state law to do intrastate business as a condition of doing interstate. The Ohio case is not authority for sustaining Chapter 191.

Cooney v. Mountain States T. & T. Co., 294 U. S. 384, 79 Law Ed. 498, condemns an occupation tax measured by number of telephone instruments. The act, as construed, imposes the tax for the privilege of doing both domestic and interstate business and therefore is invalid. The court again makes the above quotation from *Sprout v. South Bend* repeated in the *Ohio* case, and cites those cases. The Supreme Court of Washington in the instant case says of the *Cooney*

case that it was there distinctly pointed out that the tax was " 'not laid on revenue derived from monthly rates as distinguished from toll charges, nor imposed with respect either to the nature of the revenue, character of the service, or manner in which the charges are fixed.' " "From what is there said," says the Washington Supreme Court, "it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different." The language quoted was used by this court in answering an argument made by defendants. It is not authority for saying that the tax would have been sustained had it been measured by gross revenue, even though imposed for the privilege of doing both local and interstate business. That point, though decided below, was not considered here. If the state court is right in its understanding of the *Cooney* case, *Crutcher v. Kentucky* and many like cases were overruled. Certainly, if the Washington court is right, the *Cooney* case is contrary to the *Pullman* and many other decisions of this court.

The language quoted by the State Court is immediately followed by the statement that the evidence shows that the same telephones, signaling apparatus, wires, etc., are used in common for both services. It was in this view, said this court, that the District

Court held it not feasible to provide separate statewide systems. But, said this court, "apart from that question," the telephone instruments are the means by which customers command service, whether intrastate or interstate. And, so far as the use of the instruments in interstate commerce is not excepted, the tax is laid indiscriminately regardless of their use. This court then said that while the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce, it cannot tax interstate commerce nor the business which constitutes such commerce nor the privilege of engaging in it. And the fact that a portion of the business is intrastate, and therefore taxable, does not justify a tax either upon the interstate business or upon the whole business without discrimination. "There are," said this court, "sufficient modes in which the local business may be taxed without the imposition of a tax which covers the entire operation." Then follows the quoted language from *Sprout v. South Bend, supra.*

Certainly, there is nothing in the preceding language of the opinion to justify the statement that a tax which violates any of the four conditions precedent to validity stated in the *Sprout* case, repeated in the *Ohio* case and again in the *Cooney* case, will be sustained. The statement that there are "sufficient (other) modes of taxing the intrastate business," re-

minds us to say that the Railroad Revenue Act of Washington, Chapter 130, Laws of 1925, provides for taxing railroad property at its value as a *going concern*, including all franchises, rights and privileges, and all property whatsoever, tangible and intangible, used in operating the railroad. *Rem. Rev. St. Sec.* 11157 (4), (quoted in full in appendix). This statute has been so construed in *N. P. Ry. v. State*, 84 Wash. 510, 147 Pac. 45, and by the District Court for the Eastern District of Washington in *N. P. R. Co. v. Adams County*, 1 Fed. Supp. 163.

Finding VI (Rec. 60), shows that appellant's gross intrastate operating revenue in 1933 was $2,179,760 and the cost of reproduction of its property in Washington, new, less depreciation (according to I. C. C. valuation) is $29,733,312, while Finding No. II (Rec. 58) shows that appellant has invested in its railway line in Washington in excess of $100,000,000. Ad valorem taxes in Washington for 1933 were $1,238,385. Finding VII (e) (Rec. 64.) This suggests that ad valorem taxation, to say the least, is ample. The value on which those taxes are calculated includes the franchise and all intangibles, *including the privilege of doing business*, the very same privilege for which appellant is taxed by Chapter 191. Were it otherwise, the railroad would be taxed on the lesser aggregate value of the separate

parcels of real and personal property of which it is made up, not as a going concern. Compare *N. P. R. Co. v. State, supra.* This is a "sufficient mode in which the local business may be taxed," and marks the limit of the state's power to tax the business of the interstate transportation system. If this be not so these systems are at the mercy of the several states. If a tax of 1½% of gross revenue may be levied, why not 10% or 50%? And if Washington has the power claimed, so have the other states. Even before expiration of the period prescribed for Chapter 191 it was superseded by Chapter 180, Laws of 1935, Rem. Rev. St. 8370-36, raising the rate to 3%. *To uphold Chapter* 191 *will give to the states power of life and death over the interstate transportation system of the United States.*

The dissenting opinion below perceives the menace also adverted to by this court in *California v. C. P. R. Co.*, 127 U. S. 1, and by Mr. Justice Holmes in *Galveston, Harrisburg and San Antonio Ry. v. Texas*, 210 U. S. 217, where he said:

"The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt

or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce."

In his dissenting opinion in the case at bar Judge Steinert, citing *Bowman v. Continental Oil Co., supra, East Ohio Gas Co. v. Tax Commission, supra,* and *Cooney v. Mountain States Telephone & Telegraph Co., supra,* says in part:

"Under these cases, one of the essentials to the validity of a tax is that the one who is taxed could discontinue its intrastate business without also withdrawing from its interstate business.

"The majority seek to make a distinction between a tax imposed as a license to do business, or one upon the instrumentalities used and a tax on gross income, * * * The distinction is without substance, when the result in a given instance is to burden or interfere with interstate commerce * * *

"That the action of the state will interfere with interstate commerce is now very apparent. If the railroad companies or telephone companies should be permitted or be compelled to withdraw from their intrastate business, how many trains would continue to run and how many telephones would remain in place in this state, merely for the purpose of enabling their users to do an interstate business? Not only would all local service be discontinued, but with the exception, possibly, of one or two large cities, the people of the state would be without interstate service as well.

"If, as a matter of law, the companies may not withdraw from intrastate business, or if, as a matter of fact, it is wholly impracticable for them to do so, then such intrastate business must continue to be operated at the expense of the interstate business. If one state be permitted to impose burdens upon inter-

state commerce through the medium of taxation, then all states in which the companies operate may do likewise, and the accumulated burdens thus imposed would in the end result in complete strangulation of all their interstate commerce. The sum and substance of it all is that the tax imposed on intrastate business must be borne by the proceeds from interstate business. It is, therefore, a burden upon, and interferes with, interstate commerce, and for that reason is invalid."

We submit that state power to tax is *not* power to destroy, as applied to the interstate transportation system. Compare *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563; *G. N. v. Minnesota*, 278 U. S. 503.

Appellee relied below most strongly on *Ohio Tax Cases*, 232 U. S. 576. This case is not noticed by the State Supreme Court. There the tax was for the privilege of exercising the corporate franchise granted by the state to a domestic corporation. *Kansas etc. v. Botkin*, 240 U. S. 227, is a similar case. *St. Louis etc. R. Co. v. Arkansas*, 235 U. S. 350, also relied upon below, sustains a *property* tax measured by percentage of the outstanding capital stock, as is recognized in *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450. Therefore, those cases, and others in the same category, are not in point. Besides, the facts here present were not present in those cases. The Supreme Court of the United States has never sustained a statute like Chapter 191 under the circumstances shown by this record.

By Sections 1 (18), 1 (20), 13 (4), 15A (2), 15A (3), Chapter 1, Title 49 U. S. C. A., and Sections 2 and 4 of the Emergency Railroad Transportation Act of 1933, (Chapter 7, Section 251, et. seq., Title 49, U. S. C. A.) Congress has imposed on the local business of interstate carriers obligations in the interest of the interstate transportation system, which are inconsistent with the power of the state to levy a privilege tax upon the local business. The state cannot impose an occupation tax upon an interstate carrier under the theory that if it desires to do local business in the state it must pay for that privilege, since the carrier is obligated by federal law to engage in the very occupation which the state presumes to tax.

Under these laws Congress has so taken possession of the local business, in so far as such business has a direct relation to interstate business, that there is not room for state power to license local business as a privilege which may be granted or denied at the will of the state, nor to take any action whatever which will disable or hamper the carrier in the performance of its duty to maintain an interstate system of transportation and economically and efficiently serve interstate commerce at reasonable rates.

It is therefore obvious that the exaction of a tax by the state for the privilege of carrying on local

commerce is a direct burden on, and a regulation of, interstate commerce, where, as here, both classes of commerce are carried over the same lines by the same employes, in the same trains, and by the use of the same instrumentalities, and the interstate business is absolutely dependent for its efficient and economical transaction upon the local business. Even if there could have been a doubt upon this point prior to the enactment of the Transportation Act, there can be none now, in view of the provisions of that act, and there is therefore controlling reason for the strict application of the rule in the *Allen*, *Adams* and other cases supra, in view of the amendments and additions to the Interstate Commerce Act by the Transportation Act of 1920. *Railroad Commission v. C. B. & Q. R. Co.*, 257 U. S. 563; *Colorado v. United States*, 271 U. S. 153; *New York v. U. S.*, 257 U. S. 591; *Dayton-Goose Creek R. Co. v. U. S.*, 263 U. S. 456; *Atlantic Coast Line R. R. v. Daughton*, 262 U. S. 413.

Quoting from *Atlantic Coast Line R. R. v. Daughton, supra*:

"Under the commerce clause it is essential that a state tax shall not directly burden interstate commerce, and that it shall not discriminate against interstate commerce. With these essentials the North Carolina act complies. It is not assessed on gross receipts."

Quoting from *Railroad Commission v. C. B. & Q. R. R., supra*:

"Congress, as the dominant controller of interstate commerce, may restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

Chapter 191 Laws of 1933, violates the Commerce Clause of Article 1, Section 8, and the Due Process Clause of the 14th Amendment to the Constitution of the United States because appellant's intrastate business, from which it cannot withdraw while continuing to do interstate business, is done at a loss, and the tax imposed by Chapter 191, if paid, must be paid out of income derived from appellant's interstate business, and from property located outside the State of Washington. The tax is not rendered constitutional by the fact appellant did not obtain permission, either by writ of review from the order of the Department of Public Works of the State of Washington, or otherwise, to raise rates which the State Court has found, as a practical matter, cannot be raised.

While this court has always held that *ad valorem* taxes may be imposed upon property used in interstate commerce, it has likewise always held that an excise or license tax which must be paid out of the receipts from interstate commerce is a burden on such commerce. *Leloup v. Port of Mobile, supra; Allen v. Pullman Co., supra; Western Union Telegraph Co. v.*

Kansas, 216 U. S. 1; *Postal Telegraph & Cable Co. v. Richmond*, 249 U. S. 252; *Interstate Buses v. Holyoke Street Ry., supra; Anglo-Chilean Nitrate Sales Corporation v. Alabama*, 288 U. S. 218.

In *State ex rel Stiner v. Yelle, supra*, and subsequent decisions interpreting Chapter 191, Laws of 1933 (including the decision in the case at bar), the Supreme Court of Washington has held the tax imposed by Chapter 191 is an excise rather than a property tax.

In *Allen v. Pullman Co., supra*, it was urged that a tax of $3,000 per annum for carrying one or more local passengers on cars operating within the State of Tennessee was a burden upon interstate commerce, to which argument this court replied that "if the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection."

In *Postal Telegraph & Cable Co. v. Richmond, supra*, a statute of Virginia required all telegraph companies doing business in the state to transmit all messages, both state and interstate, upon the payment of the usual charge. It was argued that this statute, to-

gether with an ordinance of the City of Richmond imposing a license tax for the privilege of engaging in business in the city, imposed a burden upon interstate commerce for the reason that the net receipts from its intrastate business were insufficient to pay the tax, and payment, if compelled, would have to be made from interstate receipts. Discussing this contention this court said: "If the facts were as thus asserted, it well might be that this tax would be invalid."

In *Western Union Telegraph Co. v. Kansas, supra,* the court said: "We are aware of no decision by this court holding that a state may, by any device or in any way, either by a license tax in the form of a 'fee' or otherwise, burden the interstate business of a corporation of another state." And in *Anglo-Chilean Nitrate Sales Corporation v. Alabama, supra,* it was said: "The power of the state to withhold from a foreign corporation permission to exercise its franchise to do business therein, does not enable it, when granting the privilege, to burden by taxation interstate commerce carried on by such corporation within the state."

Appellant's answer alleges, and both courts below have found, that appellant's intrastate business was conducted at a loss during the year 1933, and that

the tax imposed by Chapter 191, Laws 1933, if paid, will have to be paid out of appellant's earnings from interstate and foreign commerce and from the income from its property located outside the State of Washington. (Finding of Fact VIII, Rec. 69.)

See also opinion below 83 Washington Decisions 52, 66, 48 Pac. (2) 931, 938, Rec. 84.

Finding XIII (Rec. 73), is that appellant's railroad is economically managed and its operation in intrastate business is essential to the people of the state. Appellant cannot increase many intrastate rates because of competition of other kinds of transportation, and for economic reasons, nor can it do so under the laws of the state without consent of the Department of Public Service. Appellant applied for an increase of intrastate rates but the application was denied for the reasons stated in the Department's findings attached to the supplemental answer as Exhibit "A". Appellant, as a practical matter, has been unable to increase its revenue from intrastate business, and the court finds that it has done all it can, but without success. The application for increased rates, denied by the Department's order, was made in connection with an application to the Interstate Commerce Commission in Ex Parte 103, 191 I. C. C. 361, for an extension of the period during which increases were allowed. The application was denied

April 7, 1933. Chapter 191 was effective from August 1, 1933, to July 31, 1935, (Sec. 2 (2)). Necessity for reducing local short haul rates to meet truck competition is common knowledge. *Western Trunk Line Class Rates*, 204 I. C. C. 595, 645, 647. The deficit from intrastate business, exclusive of return on value, and exclusive of the occupation tax in question, was $99,269 for the year 1933 (Finding VI, Rec. 60.)

The carrying charge on the investment is no less an expense of the business than the cost of labor and materials. *Missouri ex rel. S. W. Bell T. Co. v. P. S. Commission*, 262 U. S. 276; *Rowland v. Boyle*, 244 U. S. 106; *N. P. R. Co. v. North Dakota*, 236 U. S. 585. The obligation of intrastate business under Transportation Act, 1920, to contribute a just proportion of operating expense, including return on value of the property, is declared in *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563. Whether the burden on interstate commerce be due to inadequate intrastate rates, excessive taxation, excessive expenditures in the local interest, or otherwise, is without legal significance. Compare *Colorado v. United States*, 271 U. S. 153; *Smyth v. Ames*, 169 U. S. 466. Even ad valorem taxation (measured by a percentage of gross revenue), is subject to the restraint of the commerce clause. *G. N. R. Co. v. Minnesota*, 278 U. S. 503. Why,

then, not an occupation tax? In *Southern R. Co. v. Kentucky*, 274 U. S. 76, considering a franchise tax, the court said that "no intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare-bones—as the mere tangible elements properly may be called, *Omaha v. Omaha Water Co.*, 218 U. S. 180." Certainly, no value inheres in the so-called privilege of being compelled to do intrastate business at a loss. *Allen v. Pullman Co., supra; Pullman Co. v. Adams, supra; Postal Telegraph Co. v Richmond, supra.* And if that phase of the carrier's business is done at a loss it is manifest that interstate commerce must really carry the burden of the tax, though nominally it may be imposed upon the local business.

The tax is not rendered constitutional by fact appellant did not secure permission to raise intrastate rates which, due to competitive and economic conditions, cannot be raised.

The state court distinguished the *Richmond* case, *supra*, on the ground that the legislature has provided a remedy by application to the Department for increased rates, "with right of review by the Superior Court and appeal to this court." From the findings, said the court, it appears that an application has been made and denied and that another is pending, but it does not appear "that the respondent has ex-

hausted the relief granted by the statute, and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional." *Postal T. Co. v. Fremont*, 255 U. S. 124, is cited. The *Fremont* case is so different in its facts as to lack authority here, even had no application for increased intrastate rates been made and denied. The state court must mean that appellant did not seek review and reversal of the Department's order. Review, of course, would have been unavailing unless the order would have been reversed. Therefore, the state court assumed that it was erroneous, contrary to the well settled rule in the State of Washington. *P. S. E. Ry. Co. v. R. R. Commission*, 65 Wash. 75; 117 Pac. 739; *State ex rel Tacoma Eastern Ry. Co. v. N. P. R. Co.*, 104 Wash. 405; 176 Pac. 539; *North Bend Stage Line v. Denney*, 153 Wash. 439; 279 Pac. 752.

Court review is not, as in *Prentis v Atlantic Coast Line*, 211 U. S. 210, a part of the administrative machinery. The state superior and supreme courts, on writ of review, exercise a purely judicial function. Therefore, after the Department had finally denied the increase of rates applied for, appellant had exhausted its administrative remedy to avoid the uncompensatory rates under which it was compelled to ren-

der intrastate service. See *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196, where the nature of the remedy by writ of review of the Department's order is determined.

The *Kuykendall* case went up from the State of Washington. It involved the statutory provisions under which the Department of Public Works of Washington is charged with the duty of fixing the rates of public utility companies. Replying to a similar point as that made by the Supreme Court of Washington in the instant case, Chief Justice Taft, speaking for the court said:

"It is clear that the function to be performed by the Superior Court under this section (10428 Remington's Compiled Statutes of Washington) is judicial * * *. It is apparent from these provisions (Sec. 10428 Remington's Compiled Statutes of Washington, which will be found in the appendix) that after the commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service."

Appellant lost no rights by acting upon the presumption of validity of the Department's order. *Pacific T. & T. Co. v. Kuykendall, supra.* But, even so, what would it avail appellant if the loss from diversion of traffic would be greater than the gain from increased intrastate rates? *Florida v. United States*, 282 U. S. 194, holds that an order of Interstate Com-

merce Commission under Sec. 13 (4) is void for lack of a finding that increased intrastate rates would, in fact, produce additional income, for, said the court, "the raising of rates does not necessarily increase revenue. It may, in particular localities, reduce revenue, instead of increasing it, by discouraging patronage." *C. M. & St. P. v. Wisconsin*, 238 U. S. 492, holds invalid under the due process clause a Wisconsin statute prohibiting letting down of an unengaged upper berth in a sleeping car when the lower berth in the same section is occupied. The Wisconsin Supreme Court said that "if compliance with this command imposes extra burdens, they are not of such an unusual nature as to be oppressive; and if it involves additional costs in the conduct of the business, then the defendant can readily be secured against such loss by having the rate adjusted to meet this burden." This court, reversing the Wisconsin court, said:

"But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the company *may* be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed. Sweet v. Rechel, 159 U. S. 380."

Not only is there no fixed right of compensation payable at the time of taking, but compensation will

never be received because increased rates, if obtained, will not apply retroactively. Even though the state court's position were otherwise well taken it is untenable under the Wisconsin case. We know of no precedent for sustaining an otherwise unconstitutional tax on the assumption that other presumptively valid state action is unconstitutional and will be set aside by a state court at the end of protracted and expensive litigation, even if indemnity for past loss would then be received. More especially, where it affirmatively appears that greater loss than gain will follow nominal success.

Chapter 191, Laws 1933, violates due process clause of 14th Amendment to Constitution of United States

It is, perhaps, unnecessary to add that, as the tax must be paid out of income derived from appellant's interstate business, and from property located outside the State of Washington, Chapter 191 violates the 14th Amendment, as well as the commerce clause. The trial court so found. (Finding of Fact VIII, Rec. 69; Conclusion of Law VII, Rec. 76.) The state Supreme Court found that appellant's intrastate business is conducted at a loss. The following authorities point to the invalidity of the statute under the 14th Amendment:

Western Union Telegraph v. Kansas, supra; Ludwig v. Western Union, 216 U. S. 146; *Fargo v. Hart*, 193 U. S. 490; *Wallace v. Hines*, 253 U. S. 66; *Alpha Portland Cement Co. v. Massachusetts, supra; Shaffer v. Carter*, 252 U. S. 37.

The Tax imposed by Chapter 191, Laws 1933, is not rendered constitutional by reduction of ad valorem taxes

The Supreme Court of the State of Washington mentions Chapter 4, Laws of 1933 (Remington's Revised Statutes of Washington, 1933 Supplement, Sec. 11238-1), Initiative Measure 64, limiting the aggregate of ad valorem taxes on real and personal property to 40 mills on the assessed value. It is said that by this law appellant's ad valorem taxes have been reduced approximately one-half. We need not stop to show that the court greatly overestimates the reduction. Why the 40 mill act is mentioned by the court is not apparent, except that it says: "having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and Chapter 191 was undoubtedly passed for this reason."

It is something new to intimate that an unconstitutional tax ought to be sustained because the state has not imposed a constitutional tax for as much as it might. In its brief below the State urged, and will

undoubtedly urge here, that since appellant's total tax bill under Chapter 191 and Initiative Measure 64 is somewhat less than appellant's ad valorem taxes imposed prior to the enactment of this legislation, the tax imposed by Chapter 191 does not constitute a burden upon interstate commerce. Such an argument amounts to this: If taxes imposed under a constitutional method are reduced, so that when added to the taxes imposed under a new and unconstitutional method, they are less than the total amount of lawful taxes formerly imposed, the aggregate result makes the unconstitutional method constitutional. If that argument is sound, then the constitutionality of a tax as a burden upon interstate commerce is determined, not by its effect upon that commerce, but by the extent to which a state may impose ad valorem taxes.

Meyer v. Wells Fargo & Co., 223 U. S. 298, was an action to enjoin the enforcement of a gross revenue statute of the State of Colorado, on the ground it was a burden upon interstate commerce. The state made a contention similar to that made in the case at bar with reference to the 40 mill act, which this court answered as follows:

"It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session, this really was a property tax. But the scope and purport of the act, so far as

it affects Express Companies, are too obvious to admit such a view. The tax is 'in addition to the taxes levied and collected upon an ad valorem basis' * * *. Therefore, this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way."

Initiative 64 is a general law, applying to all real and personal property from which appellant received no special benefit. *Denny v. Wooster*, 175 Wash. 272; 27 Pac. (2) 328. It was strengthened, the limit still further reduced, and reenacted as Initiative 94, Chapter 2, Laws of 1935 (Remington's Revised Statutes of Washington, Sec. 11230-1a). *Love v. King County*, 81 Washington Decisions 405; 44 Pac. (2) 175. That the people of Washington, menaced by ever mounting delinquencies of ad valorem taxes, which they could not pay, took the law into their own hands may be inferred from the enactment of these measures, as well as from acts offering a premium for the payment of delinquent ad valorem taxes. See Chapter 53, Laws 1933, and Chapter 166, Laws 1935. The constitutionality of these statutes has been sustained by the Washington court. *Vance Lumber Co. v. King County*, 84 Wash. Decisions, 330. (Decided Nov. 13, 1935, and not yet reported in Pacific Reporter.)

Bearing in mind that the appellant is subject to ad valorem taxation on its value as a going concern (including its franchise to do business), whereas other

businesses, except telegraph companies, are not so valued, the new setup is far from conferring special benefits on appellant—rather is the contrary true. The only cases cited by the state in the court below as sustaining its contention that Chapter 191 and Initiative 64 must be construed together, in order to determine whether the tax is a burden upon interstate commerce, are *Baker v. Druesedow*, 263 U. S. 137, 142; *Greene v. Louisville etc. R.*, 244 U. S. 499, 518; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 479, 480. The *Baker* case involved an ad valorem tax imposed upon the property of a Texas Railroad. Under the statutes of that state a separate tax was imposed upon tangible and intangible property. The tax imposed by each statute was nevertheless an ad valorem tax, and therefore within the power of the state. Under these facts this court said that "taxes on the two kinds of property are treated by this court as part of a single ad valorem tax on railroads."

In the *Greene* case property taxes were also involved, as evidenced by the following quotation: "The various boards whose united action is by law intended to effect a uniform assessment on all classes of property, are to be regarded as one tribunal."

The *Gregg* case involved the charge of unconstitutional discrimination against transactions in interstate commerce under a statute imposing a gallonage tax on gasoline purchased in other states and brought into South Carolina, and there stored to be used and consumed in South Carolina, when there was at the same time a similar statute imposing a tax of the same amount on gasoline sold by dealers within the state. The state court had held these two statutes were to be construed together. Obviously, in a case where discrimination is charged, that would be true. All this court held was that "when the Supreme Court has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves."

The Washington court has not held that these two statutes must be construed together, but by its reference to Initiative 64 has inferred that because appellant's ad valorem taxes were reduced the state could offset the reduction by a tax for the privilege of engaging in a business which the appellant does not have the right to renounce, either as a matter of state or federal law, and which it cannot, as a practical matter abandon in any event while continuing its interstate business.

Appellant submits that the judgment of the Supreme Court of the State of Washington is erroneous and prays for a reversal.

Respectfully submitted,

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APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT

I.

This is an action by the State to recover from the Great Northern Railway Company a tax of 1½% of the gross intrastate revenues imposed by Chapter 191, Section 2(2) (e), Laws of 1933, for the months August to December, 1933, inclusive.

II.

Defendant is a Minnesota corporation. It owns and operates a system of steam railway having its eastern termini at St. Paul and Duluth in the State of Minnesota, and Superior in the State of Wisconsin, and extending westerly from said termini through the States of Minnesota, North and South Dakota, Iowa, Montana, Idaho, Washington, Oregon, California and the Dominion of Canada, with its western termini at Seattle and Tacoma in the State of Washington, Portland in the State of Oregon, Bieber in the State of California, and Vancouver in the Province of British Columbia, Dominion of Canada. Said line of railroad was constructed and equipped in the State of Washington more than thirty-five years ago,

long prior to the enactment of Chapter 81, Laws of 1905, and Chapter 191, Laws of 1933, and is now and for more than thirty-five years last past has been a public utility devoted to and used for the transportation of passengers and freight, both intrastate and interstate, and for the transportation of the United States mails, and has been and is now an instrumentality of interstate commerce and of the commerce of the Government of the United States, subject to the Act of Congress approved February 4th, 1897, entitled "An Act to Regulate Commerce," and the Acts amendatory thereof and supplemental thereto, including the Emergency Transportation Act of 1933, and also, in respect to intrastate transportation performed by it within the State of Washington, subject to the Constitution of said state and to the "Public Service Commission Law" of said state, consisting of Chapter 117 of the Washington Session Laws of 1911 and the acts amendatory thereof and supplemental thereto. Long prior to the enactment of Chapter 191, Laws of 1933, defendant had expended and now has invested in its said railway line in the State of Washington more than one hundred million dollars, in order to provide adequate facilities for the transportation of both interstate and intrastate commerce and the commerce of the Government of the United States, including the United States mails.

III.

Defendant's railroad system comprises approximately 10,541 miles of track, of which approximately 1,450 miles are and were in the State of Washington at the time said Chapter 191, Laws of 1933, became effective. Defendant's railroad is taxed in the State of Washington under and by virtue of Chapter 130, Washington Special Session Laws of 1925, on its fair market value considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. *Ad valorem* taxes have long been levied and paid thereon and for 1933 were $1,250,860.49. The tax of 1½% of gross revenue imposed by said Chapter 191, Laws of 1933, is not a property tax nor in lieu, either in whole or in part, of a property tax, nor is it a supervision tax, but it is an excise tax imposed on defendant solely for the privilege of doing a "steam railway business" in the State of Washington.

IV.

Defendant's gross revenue from intrastate "steam railway business" (on which the tax of 1½% is computed) for August to December, 1933, and the amount of the tax, are as follows:

Month	Gross Revenue	Tax
August	$168,256.60	$ 2,523.85
September	189,626.07	2,844.39
October	195,920.76	2,938.81
November	194,615.73	2,919.24
December	117,470.66	1,762.06
Total		$12,988.35

These are the amounts shown in defendant's amended answers to plaintiff's interrogatories.

It was stipulated in open court that, if plaintiff be entitled to recover anything, the judgment should be without prejudice to the right of either party to the adjustment and correction provided for by the Act. Subject to this stipulation, the court finds that if plaintiff were entitled to recover anything in this cause, the amount would be the said sum of $12,988.35.

V.

It has long been known and universally recognized that intrastate transportation in the State of Washington is much more expensive per unit of freight than interstate. Some of the reasons are the much shorter average haul of the intrastate business, the lesser traffic density, especially on branch lines most largely used locally, much less tonnage per train, more frequent stops, double terminal expense, due to the fact that intrastate freight is both originated and

terminated in the state, whereas interstate freight incurs at most but one of these handlings in the state. These and other peculiarities of intrastate business make it greatly more expensive per unit than interstate business. It is unnecessary to find the exact percentage of additional cost of intrastate business over interstate, but the court finds that such cost is greater in proportion to revenue than the cost of the interstate.

VI.

Defendant as a carrier subject to the Acts of Congress regulating interstate commerce keeps its system accounts as required by the Interstate Commerce Commission, but these accounts do not segregate or show the results of operations in individual states, nor do they divide revenues and expenses between interstate and intrastate business. Defendant also files annual reports with the Department of Public Works of Washington, showing certain statistics of its operations within the state, but such reports do not segregate interstate from intrastate expenses, and while they purport to segregate interstate from intrastate revenues, the court finds that such segregation has never been accurately made, for the reason that it was never a matter of importance either to the state or to the Railway Company prior to the imposition of the state occupation tax. For these

reasons, and because no accounts are kept currently of the expenses of intrastate business separately from interstate business within the State of Washington, a special study was required to determine the financial result of operating the defendant's railway line in intrastate commerce in the State of Washington for the year 1933. This study was made by defendant's witness, W. M. Burn, a railroad statistician and accountant of ability and experience. No original study of the subject was made by or in behalf of the plaintiff, but its witness, C. A. Manschreck, statistician for the State Tax Commission, undertook to point out certain alleged errors in Mr. Burn's study and to restate the defendant's exhibit based upon his (Mr. Manschreck's) correction of these alleged errors. Based upon the evidence of Mr. Burn and Mr. Manschreck and the other evidence in the record, the court finds that the operating revenues, operating expenses, net railway operating deficit and other results of the defendant's intrastate operations in Washington for the year 1933, are as follows:

Great Northern Railway Company—Washington—Calendar Year 1933

INTRASTATE OPERATIONS

1. Gross Operating Revenues	$2,179,760
2. Operating Expenses	1,730,361
3. Net Revenue from Railway Operations	449,399
4. Railway Tax Accruals	335,247

5. Railway Operating Income	114,152
6. Equipment Rents—Net Debit	19,966
7. Joint Facility Rent—Net Debit	193,455
8. Total Rentals—Net Debit	213,421
9. Net Railway Operating Deficit	99,269
10. Cost of Reproduction New, Less Depreciation, as of I. C. C. Valuation Date (June 30, 1915) plus Additions and Betterments to December 31, 1933, of Railway Property and Equipment in Washington — Intrastate Proportion	29,733,31[illegible]
11. Annual Rate of Return Earned on above Reproduction Cost	Deficit
12. Interest on above Reproduction Cost at 5.75% per Annum	1,709,665
13. Amount Short of Earning a Return of 5.75% per Annum	1,808,934

VII.

Gross operating revenues shown in the foregoing finding (No. VI.) are those actually earned by the defendant in intrastate commerce during the year 1933. The operating expenses and other charges shown are those actually incurred by the defendant in such commerce during the year 1933, as nearly as such expenses and other charges can be determined, and the court finds that they are substantially correct as shown. These expenses and other charges represent the direct cost incurred by the defendant in intrastate commerce in the state during the year 1933 plus an apportionment of certain expenses and charges commonly incurred in both interstate and intrastate commerce within the state, which apportion-

ment has been made on the basis of various use units. The use units so employed the court finds are in all cases suitable and comparable for the purpose of obtaining a reasonable division of expenses and charges with respect to property used in common. In further explanation of Finding No. VI. the court finds and states that the results there shown were reached by the following methods:

(a) *Terminal Costs.* The expense of switching in terminal and freight division points was ascertained by a special study made in a test week. The week used was that ending June 15th, 1934, after determining that that period was fair to the State and representative of conditions during the year 1933. The test week was, in fact, too favorable to plaintiff, in that the volume of traffic moving during that week was greater than that moving during an average week of 1933, being approximately 1/49th, instead of 1/52nd of the year's traffic, resulting in a lower cost per unit of traffic than the average of 1933, and therefore resulting, when applied to defendant's intrastate freight business for the entire year, in understating the cost. This study of terminal expense was made by an accepted and widely used method known as the "Coverston-Sauer Formula." This formula has often been used in important cases before the Interstate Commerce Commission and has the approval of that

body. It has been used and accepted in a number of court cases in this state. The basis is the engine-hour cost of switching in the several classes of switching work, as, for example, breaking up and assembling cars into trains, moving cars between breakup yards and industrial tracks, etc. The total cost of the work includes wages, supplies, maintenance of tracks and locomotives, and all applicable costs ascertained in detail and segregated by appropriate account numbers in accordance with the uniform system of accounts prescribed by the Interstate Commerce Commission. The details are too voluminous to be set out in these findings, but they are fully described in the testimony and explained in Great Northern Exhibit 11, pages 16 to 27, inclusive.

(b). *Road Haul Costs.* A special study was made of each train run on the defendant's line in the state during the test week ending November 21st, 1933, which was fairly representative of conditions during the entire year. This study was made to ascertain the car-miles, gross and net ton-miles and kind of freight, whether intrastate or interstate. The direct operating expense for wages, fuel, water and lubricants of the various trains during this period was ascertained. Indirect expenses, such as maintenance of way and structures, and maintenance of equipment, were applied to the intrastate business in proportion

to the use made of the property by that business, different appropriate use units being used for the various services. The details are shown on pages 12 and 13 of Exhibit 11.

(c). *Capital Charges.* The cost of reproduction new, less depreciation, of the defendant's railroad property in the state as of the Interstate Commerce Commission valuation date (June 30th, 1915), plus additions and betterments to December 31st, 1933, is $122,038,008. Of this the court finds that $29,733,-312 is applicable to the defendant's intrastate traffic. This figure was obtained by finding the relationship of intrastate operating expenses to total operating expenses in the state for the year 1933, and represents as nearly as may be found the value of the defendant's property devoted to intrastate commerce in the State of Washington at the time of the hearing of this cause.

(d). *Joint Facility Rents.* The defendant incurred a net debit of $794,018 for joint facility rents in the State of Washington in the year 1933. This expense the court finds is assignable to the defendant's intrastate business upon the basis of the relationship of intrastate operating expenses to total operating expenses within the state for the year 1933. The plaintiff's witness criticized this allocation, upon the

ground that the major part of the defendant's joint facility rental is paid for the joint use of the Northern Pacific Railway Company's railway line between Seattle and Vancouver, Washington, and that because the ratio of interstate to intrastate car-miles of the defendant on this line is higher than the ratio of defendant's interstate operating expense to intrastate operating expenses in the state, the joint facility rentals incurred on this line should have been divided between the defendant's interstate and intrastate business on the basis of the car-miles made in the two classes of service on the line. No effort was made by the plaintiff to localize any other line of the defendant in the state, either as to joint facility rentals, operating expenses or charges of any kind. On the contrary, state-wide averages were used by the plaintiff's witness in the computation of all other costs. The court finds that for the purpose of properly allocating joint facility rentals, the defendant's property in the state must be treated as a whole, because the traffic contributed by the Seattle-Portland line to the defendant's other lines in the state increases the volume of its business more than it increases the expense of handling, and thus operates to reduce the unit cost of its entire operations throughout the state. In addition, the court finds that the defendant has several lines in the state on which low-grade intrastate traffic predominates,

and that, if the expense of operating such lines were assigned to intrastate business on a car-mile basis, the total expense assigned to the defendant's intrastate traffic would be greater than the amount assigned thereto by the court's finding No. VI.

The court further finds that, by having joint use of said Seattle-Portland line through the payment of said joint facility rentals, the defendant is enabled to secure additional traffic for its lines in the state as a whole and thus to reduce its cost of operation per unit of traffic below the cost that would be incurred in the absence of said arrangement.

(e) *Taxes.* *Ad valorem* taxes paid by the defendant on its property in Washington for the year 1933, after deducting a small amount charged to other railway tenants of its property, were $1,238,385. The Federal taxes chargeable to Washington on the basis of the relation of Washington operating revenue to system operating revenue for the year 1933 amounted to $9,593, making total state and Federal taxes chargeable to the state of $1,247,978. This amounts to 15.38% of the defendant's gross operating revenues—intrastate and interstate—earned in the State of Washington in the year 1933. The court further finds that this amount should be charged to the intrastate and interstate business, respectively,

upon the basis of the gross revenues earned in the two classes of service in the state, and that the sum of $335,247 should thus be charged for state and federal taxes to the defendant's intrastate business in the year 1933.

Apportionment of taxes to intrastate business on the relation of gross interstate and intrastate revenue is a generally used basis, has been used in rate litigation heretofore occurring in this state, and is correct. The alternative method suggested by plaintiff, namely, the relation of freight car-miles plus passenger car-miles—intrastate to interstate—is without precedent, and is incorrect. It attempts to make a common denominator of the freight car-mile and the passenger car-mile, which are two entirely different things. The plaintiff further criticizes the gross revenue basis of apportionment, upon the ground that it assigns to the State of Washington only a mileage proportion of interstate revenues and that, because Washington is a terminal state, it is entitled to more than a mileage prorate of interstate revenues. Increasing the assignment of interstate revenue to the state proportionately reduces the assignment of taxes to the intrastate business.

The court finds, however, that the mileage prorate method is correct, for the following reasons:

(1). It is the method long prescribed by the Department of Public Works of Washington for railroad reports to that Department.

(2). It is the method used in reporting to the Railroad Commissions of all other states through which the defendant operates.

(3). While other methods have been suggested, none has ever been agreed upon, and the Interstate Commerce Commission, after holding extended hearings on the subject, failed to make any decision.

(4). Any different method would have to be agreed upon by all the states and the Interstate Commerce Commission, and no such agreement is obtainable, as demonstrated by the proceedings before the Interstate Commerce Commission in the case just mentioned.

(5). On the defendant's line, the interstate bridge traffic—meaning traffic that neither originates nor terminates in Washington, but moves through the state—is practically equal to the interstate traffic that originates or terminates in the state. In 1933, the total amount of bridge traffic handled by the Great Northern in the State of Washington amounted to 927,498 tons, which was almost equal to the total interstate traffic originated or terminated in the state, 1,069,903 tons. Thus, as against every ton

which incurs a terminal handling in Washington, there is practically a corresponding ton whose terminal handling is entirely in other states. The average interstate shipment handled over the defendant's line in Washington is thus found to incur substantially one-half of one terminal handling in the state, as compared to two terminal handlings incurred by each intrastate shipment — a ratio of one to four. The assignment of interstate revenues to Washington upon a mileage basis gives Washington credit for all the revenue covering terminal costs to which the state is entitled and is fair to the intrastate traffic.

(6). One of the reasons advanced by the plaintiff for augmenting Washington mileage proportion of interstate revenues is the contention that expense disproportionate to mileage is incurred at the terminals in Washington. It is true that the operation of terminals is expensive, but the court also finds that operating expense disproportionate to mileage is incurred in other states. Examples of this are (a) operation through the Rocky Mountains in Montana, while the difficulties of mountain operation in Washington have been very much reduced by the Cascade Tunnel, which very much lessens operating expenses; (b) the reduction of both mechanical and personal efficiency by extremely cold weather on the central and eastern part of the defendant's line, a condition

which does not exist in Washington; (c) the necessity of using treated water for locomotives on the plains, no similar expense being required in Washington.

(7). The defendant's large Washington terminals are at Seattle, Tacoma and Spokane. Its large eastern terminals are at the Twin Cities in Minnesota, and at the head of the Great Lakes. The valuation placed by the Interstate Commerce Commission upon said western terminals is but 42.86% of the valuation found for its said eastern terminals, and the mileage of tracks in its said western terminals is but 30.20% of the mileage of tracks in its said eastern terminals. Therefore, if it be assumed that operating expense is increased in proportion to the extent and value of terminals and that revenues should be allocated to states in the same proportion, there would be more revenue assigned from Washington to Minnesota than there would be to assign from Minnesota to Washington on a car moving from Washington to Minnesota, or vice versa.

All things considered, the court finds that, if the mileage proration method were to be modified on the theory that Washington is a terminal state, it would be necessary to apportion as much interstate revenue from other states to Washington as would be appor-

tioned from Washington to other states. The court therefore finds that the mileage prorate method of assigning interstate revenues to Washington is correct and fair to the intrastate traffic.

(f). *Equipment Rentals.* Equipment rentals applicable to Washington intrastate traffic were determined upon the relation of intrastate car-miles to total car-miles in the state during 1933 in the passenger and freight services, respectively. The evidence shows that the assignment is in substantial accordance with the actual use in the state of the equipment on which the expense was incurred.

(g). *Intrastate Gross Operating Revenues, Freight and Passenger.* Defendant's total intrastate gross operating revenues in Washington for the year 1933 were as follows:

Account	Freight	Pass.	Total
(101) Freight	$1,502,153	–0–	$1,502,153
(102) Passenger	–0–	$306,621	306,621
(103) Excess Baggage	–0–	2,163	2,163
(105) Parlor and Chair Car	–0–	3,292	3,292
(106) Mail	–0–	131,721	131,721
(107) Express	–0–	36,780	36,780
(108) Other Passenger Train	–0–	1,746	1,746
(109) Milk	–0–	12,495	12,495
(110) Switching	38,367	–0–	38,367
(111) Special Service Train	14	–0–	14
(112) Other Freight Train	434	–0–	434
(131) Dining and Buffet	–0–	26,971	26,971
(132) Hotel and Restaurant	–0–	15,654	15,654

(133) Station, Train and Boat Privileges	-0-	318	318
(134) Parcel Room	-0-	2,611	2,611
(135) Storage — Freight	2,010	-0-	2,010
(136) Storage — Baggage	-0-	494	494
(137) Demurrage	1,016	-0-	1,016
(138) Telegraph and Telephone	3,653	1,279	4,932
(142) Rents of Buildings and other Property	46,570	16,312	62,882
(143) Miscellaneous	28,427	9,957	38,384
(151) (152) Joint Facility Net Debit	-0-	(11,298)	(11,298)
Total	$1,622,644	$557,116	2,179,760

(h). *Intrastate Passenger Expense.* Total passenger operating expenses applicable to Washington intrastate traffic in the year 1933 were $897,458, determined in the following manner: First, in dividing expenses between the freight and passenger business, those expenses incurred separately in the two services are assigned separately to them; second, common expenses are divided between the freight and passenger services on the relation of the cost of fuel consumed in the two services, respectively. This is the method prescribed by the Interstate Commerce Commission and long prescribed by the Department of Public Works of Washington. Third, total passenger expense is divided between the interstate and the intrastate passenger business in proportion to the revenues earned in the two classes of service. The court finds that this was a correct method of deter-

mining the expense of the intrastate passenger service on the defendant's line.

(i). *Period Used in Determining Certain Expenses.* In figuring expense of maintenance of way and freight car repairs, the preceding findings of the court are based upon the average cost for three years, rather than upon costs incurred in the year 1933. The method used is correct, for the following reasons: Maintenance is not an evenly recurring annual item. It is in part due to use, but in greater part due to wear and wastage of the property. The necessity for maintenance accrues regardless of whether money is available to provide it. For this reason, the maintenance expense actually incurred in any given year is unlikely to be representative of the normal. It is customary in railroad accounting to use a longer period than one year, either five years or three years, in computing normal maintenance. The court finds that the three years' maintenance figures used are correct. Plaintiff's witness offered an exhibit in which maintenance was figured on the basis of but one year, namely, the year 1933. This witness did not state that one year was a proper period for computing maintenance. The court finds that it is too short and cannot be used.

(j). *Pensions.* Plaintiff criticizes the inclusion of a relatively small item for pensions in the operating

expenses assigned by defendant to its Washington intrastate traffic. The court finds that these pensions were paid to superannuated employes of the defendant and were in the nature of deferred compensation for services performed during their active years and that the payment of these pensions was made by the defendant's management in the exercise of proper discretion and business judgment and that they were properly chargeable to operating expenses.

(k). *Other Details of Cost Study.* The court finds that in addition to the details herein noticed the defendant's Exhibit 11, introduced by its witness Burn, and the methods therein used, are substantially correct and follow approved methods of accounting and shows the results of its intrastate operations in the State of Washington during the year 1933 with substantial accuracy. The court further finds that financial results of operation of defendant's railway system and of the portion thereof within the State of Washington for years prior to the year 1933, because of difference in revenues and operating costs and for other reasons, are not representative of financial results of operation for the year 1933 and at the date of the trial of this cause.

VIII.

The court finds and concludes that defendant's local or intrastate business as a steam railway company in

the State of Washington is conducted at a loss and was conducted at a loss during the entire year 1933, and that the tax imposed by Chapter 191, Laws of 1933, if paid, will have to be paid out of defendant's earnings from interstate and foreign commerce and from the income of its property located outside the State of Washington.

IX.

By Chapter 117, Washington Session Laws of 1911, there was created an administrative tribunal called the Public Service Commission (later called the Department of Public Works and now called the Department of Public Service), with the usual powers of regulation and supervision of public utilities, including common carriers by railroad, and the powers and duties of the Railroad Commission, which was created by Chapter 81, Washington Session Laws of 1905, were transferred to said Public Service Commission: Defendant's investment in its line of railway was made to provide adequate facilities for the handling of both interstate and intrastate commerce and a substantial part thereof was made by order of the Railroad Commission of Washington and its successors, the Public Service Commission and the Department of Public Works, for the purpose of equipping the defendant's property to comply with said Public Service

Commission law and the acts amendatory thereof and the orders made pursuant thereto.

Said Railroad Commission and Public Service Commission, and their successors, were established and have been maintained pursuant to Article XII., Section 18, of the Constitution of the State of Washington, providing that "A railroad and transportation commission may be established, and its powers and duties fully defined by law." It is also provided by the Constitution of the State of Washington (Article XII., Section 15), as follows:

"15. PROHIBITION AGAINST DISCRIMINATING CHARGES.—No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates."

By the provisions of the Constitution of the State of Washington and said statutes, there is imposed upon the defendant an ineluctable obligation to devote its property to the service of the people of the State of Washington in intrastate transportation, from

which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce, and therefore any tax imposed upon the defendant by said Chapter 191, Laws of 1933, would, and does constitute a burden upon and an attempt to regulate interstate commerce, in violation of Article I., Sections 8 to 10, and Article VI., of the Constitution of the United States, and of the Acts of Congress regulating interstate commerce, paricularly Section 1 (18) (21), Section 13, Section 15A and Section 19A thereof, and of the Emergency Railway Transportation Act of 1933.

X.

The court finds that suit involving the issues of this case was originally filed by the defendant in the District Court of the United States, for the Western District of Washington, to enjoin the collection of the occupation tax herein sued for by the plaintiff. The plaintiff herein obtained a stay of proceedings in said Federal Court suit by filing this action in the state court. After said Federal Court suit was filed, Senate Bill No. 18 was introduced at the special session of the 1933 Legislature of the State of Washington, and copy of said Senate Bill No. 18, marked Exhibit "B" is attached to the defendant's answer on file herein and hereby made a part of these findings. This bill was prepared and its enactment was urged by

attorneys for the State of Washington and by a member of the Tax Commission of the State of Washington, for the stated purpose of defeating defendant's contention in this case, that it is obligated by the laws of the State of Washington to do intrastate business and cannot withdraw therefrom. Said bill failed to pass.

XI.

The court finds that defendant's interstate and intrastate business in the State of Washington is inseparably commingled and mutually dependent. For one of the test periods used in the cost studies—the seven days ending November 21st, 1933—intrastate revenue net ton-miles were 4,155,692, or 32.35%, and interstate revenue net ton-miles were 8,691,505, or 67.65%. For the month of November, 1933, intrastate revenue net ton-miles were 14,547,465, or 24.80%, and interstate revenue net ton-miles were 44,121,835, or 75.20%. For the entire year 1933 intrastate revenue net ton-miles were 138,265,617, or 23.10%, and interstate revenue net ton-miles were 460,335,442, or 76.90%.

Both interstate and intrastate business, eastbound and westbound, were largely transported by defendant over the same lines of railroad, in the same trains, by means of the same employes, and with the same facilities. It is not possible, practically and eco-

nomically, or at all, to carry intrastate freight separately from interstate freight by different lines of railroad, in different trains or by means of different facilities and employes.

During the year 1933, defendant's gross passenger operating revenues in the State of Washington amounted to $1,540,264, of which $551,845 was from intrastate business. Most of defendant's passengers were carried on interstate through trains, east and westbound and north and southbound. Passengers carried on local trains operating in local service are relatively few and those trains also carry some interstate passengers. The court finds that it is not possible to carry said intrastate and interstate passengers on separate lines of railroad or by separate trains, economically and efficiently, or at all, and defendant's intrastate and interstate passenger traffic is inseparably commingled with and mutually dependent to the same extent and in the same manner as the freight traffic.

XII.

If defendant could and should abandon its intrastate freight business, it could and would somewhat reduce its train service and its car mileage, and save some direct expense applicable to its Washington freight business, but it would thereby lose its entire

gross revenue from intrastate freight business of $1,622,644. These figures are based upon operations for the year 1933, the latest available at the time of the trial of this cause. Also some reduction in passenger train service could be effected if intrastate passenger business were to be discontinued, which would result in a further saving in direct expense, but the result would be the loss by defendant of its entire gross revenue from the intrastate passenger business, which for the year 1933 amounted to $557,116. The net result of abandonment by defendant of its intrastate passenger and freight business in order to escape the tax imposed by said Chapter 191, Laws of 1933, would be the loss of $2,179,760, and the saving of not more than 14% of that amount.

Therefore, if defendant could and should abandon its intrastate freight and passenger business, the entire burden of maintaining and operating its interstate system of railroad in Washington, constructed and equipped to handle both interstate and local commerce, would fall entirely on interstate commerce and would necessitate an increase of rates and fares greater than the same could bear as a practical matter, or at all, and would result in the destruction of an essential instrument of interstate commerce and of the transportation of the mails, troops and munitions of the United States, and of the value of its property in

the State of Washington to the amount of more than one hundred million dollars.

XIII.

Defendant's railroad is well located and economically managed. It serves the principal cities and towns of the State of Washington. The operation of its railroad in local business is essential to the people of the State of Washington and of the United States. Most of defendant's local rates cannot be raised, because of competition from other kinds of transportation. Under the law, such rates cannot be raised without the consent of the Department of Public Works. Defendant has heretofore applied for an increase of certain local rates and said application was denied by the Department of Public Works, as appears from a copy of its order, marked Exhibit "A", attached to the defendant's supplemental answer herein and hereby made a part of these findings. The court further finds that defendant as a practical matter has been unable to increase its revenues from local business and further finds that whether it can do so in the future is a matter attended with great uncertainty and could be accomplished only after long and expensive litigation, and such increases, if obtained, would have no bearing upon defendant's income in the year 1933, or for many years subsequent thereto. There is at this time an application before the Inter-

state Commerce Commission known as *Ex Parte* 115, for increased rates, and a similar application before the Department of Public Works. No decision has been made and it is not known what increases, if any, will be allowed by said Commission nor what the attitude of the Department will be in the similar state case pending before it. The court finds that defendant has done all it can do to increase its revenue, but is unable to do so.

Pursuant to the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

I.

The tax imposed by Chapter 191, Laws of 1933, is an excise or occupational tax, as distinguished from a property or other kind of tax. It is imposed for the "privilege of engaging in business activities." As applied to defendant a tax of 1½% is imposed for the privilege of engaging in the business of a "steam railway." In view of the language found in Section 5, the prescribed percentage of gross income must be computed only upon the gross income received from intrastate "steam railway business." But, although this is the measure of the tax, the privilege or occupation upon which the tax is laid is that of engaging in railroad business, which includes the transaction of

both intrastate and interstate business. The penalty for failure to pay is liability to injunction proceedings and seizure and sale of the physical property of the railway, which would make it impossible to engage in either intrastate or interstate commerce. Income from other business activities in which defendant may be engaged are taxable, if taxable at all, at other rates. This case is not concerned with them.

II.

A state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce or the privilege of engaging in it. Where conditions are prescribed and license required and a tax is imposed on one engaged in both interstate and intrastate commerce, certain conditions must be met. One is that the party taxed must be free in law and in fact to withdraw from its intrastate business, while continuing to transact its interstate business free of the tax. Chapter 191, Laws of 1933, does not meet this condition.

III.

Defendant was not, and is not free, under the Constitution and laws of this state to withdraw from its intrastate business while continuing to transact its interstate and foreign business. It performs an in-

dispensable service for the people of the State of Washington, from which it cannot withdraw. Its continued performance of this service is compellable at the suit of the state and of the citizens of the state having an interest in such performance.

IV.

Defendant is an interstate carrier by railroad subject to the Acts of Congress regulating interstate commerce. Under several provisions of the Interstate Commerce Act, especially Section 1 (18) to (21) defendant is not permitted to abandon its lines in this state, or any of them, or the operation of said lines, or any of them, in either interstate or intrastate business, unless it shall first have obtained a certificate from the Interstate Commerce Commission that the present or future public convenience and necessity permit of such abandonment. Obtaining such a certificate is a precedent and indispensable condition of the right of abandonment of operation of any line or part of line of a carrier subject to the Acts of Congress. The prohibition applies to the strictly intrastate business of an interstate carrier by railroad and to every part of its line operated in connection with or as a part of its interstate system. The Interstate Commerce Act, as well by Sections 13(4), 15A, 19A and others, as by Section 1(18) to (21), has forceful

application and is an inseparable obstacle to abandonment by the defendant of intrastate business while attempting to continue to transact interstate and foreign business.

V.

Nor can defendant, as a matter of fact, or as a practical matter, withdraw from its intrastate business while continuing to transact its interstate and foreign business. Defendant's railroad was constructed to handle both classes of business. To abandon its intrastate business would throw the entire burden of operating and maintaining the interstate system on interstate commerce and would create operating losses greater than such interstate commerce could bear. Defendant's interstate business would necessarily be destroyed and its property would be confiscated.

VI.

The court concludes, therefore, that Chapter 191, Laws of 1933, in its requirement of a license (Section 3), the making of reports (Section 6) and the payment of a tax of 1½% of gross income from intrastate railway business as a condition of the right to engage in steam railway business, violates Article I, Section 8, and the Fourteenth Amendment to the Constitution of the United States, and as well Sections 1 (18) to (21), 13(4), 15A and 19A of the Interstate

Commerce Act, and the Emergency Transportation Act of 1933, and is void as applied to defendant.

VII.

The court further finds that the tax imposed by said Chapter 191, Laws of 1933, on the pretext of a tax or fee for the privilege of doing local business in Washington, is in reality a tax and burden upon interstate commerce, and upon the gross revenues received by defendant therefrom, in that said tax, if paid, would have to be paid out of the earnings of defendant from its interstate business, and is a tax upon its business done and upon income earned in other states, and upon property of the defendant located outside the State of Washington, which tax it cannot avoid by withdrawing its property from use in local commerce within the State of Washington, either under said Public Service Commission law of the State of Washington, and the amendments thereof, under the Constitution of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said tax is in violation of the Constitution of the United States, in that it imposes a burden upon, and interferes with the exercise of governmental powers of the Federal Government, to-wit, the transportation of the United States mails, troops, and munitions of the United States,

and is in violation of Article I, Sections 8 and 10, and Article VI., also the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and of the acts of Congress regulating interstate commerce, particularly Section 1 (18) (21), Section 13, Section 15A, and Section 19A thereof, and of the Emergency Railway Transportation Act of 1933, approved June 16, 1933.

VIII.

Let judgment be entered dismissing plaintiff's action with prejudice and costs to defendant.

WASHINGTON FORTY MILL LIMIT LAW

"Section 1. Except as hereinafter provided, the aggregate of all tax levies upon real and personal property by the state, county, school district and city or town, shall not in any year exceed forty mills on the dollar of assessed valuation, which assessed valuation shall be fifty per cent of the true and fair value of any such property in money, and the levy by the state shall not exceed five mills, the levy by any county shall not exceed ten mills, including the levy for the county school fund, the levy by or for any school district shall not exceed ten mills, and the levy by any city or town shall not exceed fifteen mills; *Provided*, That nothing herein shall limit the power of any county to levy taxes, at the rate provided by law, for any taxing district, other than a school district, where such taxing district includes less than the whole county: *Provided further*, That the limitations imposed by this section shall not prevent the

levy of additional taxes to pay interest or principal on bonds issued by or thru the agency of the state, or any county, city, town or school district, nor the levy of additional taxes to pay interest on, or toward the reduction at the rate provided by statute, of the principal of county, city, town or school district warrants outstanding at the time of the taking effect of this act: *Provided further*, That any county, school district, city or town shall have the power to levy taxes at a rate in excess of the rate specified in this act, when authorized so to do by the electors of such county, school district, city or town by a three-fifths majority of those voting on the proposition at a special election, to be held on the Tuesday next preceding the first Monday in October of the year in which the levy is made, in the manner provided by law for holding general elections, which special election may be called by the board of county commissioners, board of school directors, or council or other governing body of any city or town, by giving notice thereof for two successive weeks by publication and posting in the manner provided by law for giving notices of general elections, at which special election the proposition of authorizing such excess levy shall be submitted in such form as to enable the voters favoring the proposition to vote 'YES' and those opposed thereto to vote 'NO'." (Chapter 4, Laws 1933.)

WASHINGTON AD VALOREM TAX STATUTE WITH REFERENCE TO ASSESSMENT AND VALUATION OF RAILROAD PROPERTY.

"The term 'property of the railroad company', as used in this act, shall include all franchises, rights of way, roadbeds, tracks, terminals, rolling stock equipment and all other real and personal property of such company, used or employed in the operation of the railroad or in conducting its business, and shall include all title and interest in said property, as owner, lessee or otherwise. Real property not adjoining its

tracks, stations or terminals, and real property not used in the operation of the railroad is excepted and shall be assessed in the same manner as like property of individuals." (Section 11157 (4) Remington's Revised Statutes.)

"The commission shall prepare assessment-rolls and place thereon, after the name of each railroad company assessed, the general description of the property, of such railroad company, which shall include its real property, rights of way, tracks, stations, terminals, appurtenances, rolling stock, equipment, franchises and all other real and personal property of such company, which shall be deemed and held to include the entire property and franchises of such railroad company within the state, and all title and interest therein * * * For the purpose of determining the value of the property of each railroad and telegraph company appearing on the assessment-rolls, the commission may, if deemed necessary, view and inspect the property of such company, and shall consider the reports filed in compliance with this act, and the reports and returns of the company filed in the office of any officer of this state, and such other evidence or information as may have been taken or obtained bearing upon the value of the property of the company assessed. In case of railroad or telegraph companies which own or operate railroad or telegraph lines lying partly within and partly without the state, the said commission shall only value and assess the property within this state. In determining the value of the portion within the state, the commission shall take into consideration the value of the entire system, the mileage of the whole system, and of the part within this state, together with such other information, facts and circumstances as will enable the commission to make a substantially just and correct determination. When the value of the property of a railroad or telegraph company within this state shall have been ascertained and determined, the amount thereof shall

be entered upon said assessment-rolls, opposite the name of the company, and shall be and constitute the valuation of the entire property of such railroad or telegraph company within this state, for the levy of taxes thereon, subject to revision and correction by the state board of equalization as hereinafter provided. Upon the completion of such assessment, the commission shall give notice by mail to each railroad and telegraph company assessed, of the amount of its assessment as entered upon such rolls."

(Section 11165, Remington's Revised Statutes).

WASHINGTON STATUTE WITH REFERENCE TO COURT REVIEW OF ORDER OF DEPARTMENT OF PUBLIC WORKS ESTABLISHING RATES.

"Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause

to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action." (Section 10428, Remington's Revised Statutes, which is identical with the same section of Remington's Compiled Statutes.)

PART OF WASHNIGTON STATUTE (CHAPTER 180, LAWS 1935) INCREASING OCCUPATION TAX FROM 1½% TO 3%.

"From and after the first day of May, 1935, there is hereby levied, and there shall be collected from every person a tax for the act or privilege of engaging within said state in any one or more of the businesses herein mentioned. Such tax shall be equal to the gross operating revenue of the business, multiplied by the rate set out after the business, as follows:

I. Railroad, express, railroad car, water distribution, light and power, telegraph and telephone businesses—3% * * * "

(Section 8370-36 Remington's Revised Statutes of Washington, 1935 Annual Pocket Supplement.)